QUARTERLY REPORT

of the

ATTORNEY GENERAL

of

ALABAMA

For the Period

From April 1, 1943

Through June 30, 1943

Volume XXXI

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55, Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from April 1, 1943, through June 30, 1943.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State, and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also requires a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,

WILLIAM N. McQUEEN,

Acting Attorney General.

WETUMPKA PRINTING CO.
Printers and Publishers
Wetumpka, Ala.
1943

OPINIONS

April 1, 1943.

Hon. C. E. Sellers,
Tax Collector,
Pike County,
Troy, Alabama.

Taxation—Tax Collectors—County Board of Education—Title 51, Sections 2 and 884, Code of Alabama 1940.

When property was purchased by a County Board of Education on February 4, 1942, such property is subject to sale for the non-payment of taxes due on the same for the tax year commencing October 1, 1941 and ending September 30, 1942, the lien of the State for such taxes having affixed against the property on October 1, 1941. However, such property is exempt from subsequently accruing taxes under the provisions of Title 51, Section 2, Code of Alabama 1940, as long as it is used exclusively for school purposes.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of March 26, 1943, is as follows:

"I wish to request your official opinion, as Tax Collector of Pike County, Alabama, upon the following state of facts, to-wit:

"A man owned a house and lot in the City of Troy, Alabama, which was assessed for taxation on December 31st, 1941, as he was the owner of the real estate on October 1st, 1941. This property was assessed for $720.00. The owner sold the house and lot to the Pike County Board of Education on February 4th, 1942, and its deed was recorded in the Office of the Judge of Probate on February 6th, 1942. The conveyance to the Pike County Board of Education contains the general warranties, except it recites that the property is subject to a lien for paving due to the City of Troy, Alabama, and that the Pike County Board of Education agreed to pay for the paving.

"The owner of this real estate so sold assessed for taxation no other real or personal property and owns none, so far as I can learn. There is nothing in the deed as to payment of the taxes which became due October 1st, 1942, and which have been delinquent since January 1st, 1943, in the sum of $18.72, plus interest.

"The Pike County Board of Education, so I have been informed, is willing to pay these taxes, if they can legally do so, and if the lien for taxes on this property was not extinguished by their purchase of the same, as indicated above.

"My position is that if these taxes are due and should be collected by

me, should I sell the land for taxes if the Pike County Board of Education does not pay them. I wish that you would further advise me if they are liable for the taxes on this property."

It is my opinion that unless the taxes are paid on the property referred to in your request that you should sell same for the nonpayment of the taxes as you would sell any other property for delinquent taxes.

The State's lien for ad valorem taxes is set out in Title 51, Section 884, Code of Alabama 1940, which section is as follows:

"§ 884. Date of lien.—From and after the first day of October of each year, when property becomes assessable the state shall have a lien upon each and every piece or parcel of property owned by any taxpayer for the payment of all taxes which may be assessed against him and upon each piece and parcel or property real or personal assessed to owner unknown which lien shall continue until such taxes are paid, and the county shall have a like lien thereon for the payment of the taxes which may be assessed by it; and if such property is within the limits of a municipal corporation such municipal corporation shall have a like lien thereon for the payment of the taxes which may be assessed by it. These liens shall be superior to all other liens and shall exist in the order named and each of such liens may be enforced and foreclosed by sales for taxes as provided in this title, or as other liens upon property are enforced, except as otherwise provided by law."

In the case of **United States v. State of Alabama,** 85 Law Edition 896, it was decided that the tax lien of the State attached on October 1, and that such lien is valid as to the entire year's taxes, notwithstanding the fact that such land may have been acquired by the Government on October 1 or any subsequent day in the tax year, although, as held in such case, the State may not institute a suit or proceeding to sell such lands for the non-payment of the taxes after title has been acquired by the Government, for the reason that the Government is not subject to suit without its consent, and such a proceeding is construed as constituting a suit against the Government.

The County Board of Education has no such immunity from suit as has the Federal Government. It may sue and be sued. **Greeson Mfg. Co. v. County Board of Education,** 217 Ala. 565, 117 So. 163.

In the instant case when the property was purchased by the County Board of Education of Pike County on February 4, 1942, the lien for the 1942 taxes had already affixed on the property. This lien was not extinguished by the sale of the property. There is no provision of law which would prevent the sale of this property for the nonpayment of the 1942 taxes.

There is no question, that under the provisions of Title 51, Section 2, Code of Alabama 1940, that this property would be exempt from subsequently accruing taxes so long as it was used exclusively for school purposes.

It is further my opinion that the County Board of Education is legally

authorized, if they see fit, to pay the taxes on this property, so as to clear the title thereto and remove the lien of the State and County for taxes.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 5, 1943.

Miss Grace Ward,
Clerk of Circuit Court,
Bibb County,
Centreville, Alabama.

Jurors—Attendance—Mileage—Title 11, Section 98, Code of Alabama 1940—Quarterly Report Attorney General, Vol. V, page 91—Quarterly Report Attorney General, Vol. VIII, page 166.

1. Under provisions of Title 11, Section 98, Code of Alabama 1940, a juror is entitled to three dollars for each day's service.

2. Under provisions of Title 11, Section 98, Code of Alabama 1940, a juror is not entitled to mileage from point outside of county in which he resides. Opinion Quarterly Report Attorney General, Vol. V, page 91 affirmed.

3. Opinion to Hon. S. L. Johnson, Clerk and Register of Circuit Court of Calhoun County under date of August 21, 1937, Quarterly Report Attorney General, Vol. VIII, page 166, overruled and withdrawn.

Opinion by Assistant Attorney General Arbuthnot.

Dear Madam:

Your request for an official opinion bearing date of March 13, 1943, is as follows:

"I request your official opinion upon the following:

"A juror, a resident citizen of Bibb County, Alabama was subpoenaed for jury service in Bibb County, Ala. The subpoena was duly and legally served upon him. In order to attend Court in answer to that subpoena the juror had to travel from Mobile, Ala. the place of his employment to Centerville, Ala. and return. Am I as Clerk of the Circuit Court authorized under the Laws of Alabama to pay him for his attendance and also for mileage from Mobile, Ala. to Centerville and return to Mobile?

"I refer you to an opinion by the Attorney General of Alabama rendered on Nov. 20, 1936 to Hon. John R. Matthews, Clerk of Circuit Court, Montgomery County, Montgomery Ala. as the same appears in Quarterly Report of the Atty. Gen. Vol. 5 page 91, and also to an opinion of the Atty. Gen. of Ala. rendered on August 19, 1937 to the Board of Revenue, Barbour County, Eufaula, Alabama Quarterly Report of Atty. Gen. Vol. 8 page 166 with reference to the above inquiry. It appears to me that those two opinions are in conflict.

"I desire to say that in view of the fact that numerous jurors in the rural counties in Alabama are now employed in Industry and Defense Plants in the Industrial Centers of the State and are temporarily absent from their place of residence that it will work a hardship and expense upon the jurors thus situated unless mileage is allowed from their place of employment to the Court and return, and it will likewise seriously cripple the operation of the Courts if such mileage is not allowed. It further appears to me that the clear intention of the law is to the effect that such mileage should be allowed, however, this is for you to decide.

"As I have already paid a juror for such mileage, I will appreciate your immediate reply. I have been informed by the Judge of this Circuit that such questions are arising in each county of this Circuit."

Title 11, Section 98, Code of Alabama 1940, which section provides for regular jurors' fees, is as follows:

"§98. Regular jurors' fees; proved by oath of juror; certificate of clerk.—Regular jurors, grand and petit, are entitled to three dollars for each day's services, five cents **for each mile traveled in going to and returning from court,** and ferriage and toll, to be proved by the oath of the juror before the clerk of the court, whose duty it is to give each juror a certificate, stating therein the number of days he has served, the number of miles he has traveled, the amount of ferriage and toll he has paid, and the amount of compensation to which he is entitled, which certificate shall be receivable in payment of county taxes, and other county dues, and payable out of the county treasury." (Emphasis supplied)

Your first inquiry, i. e., whether you, as Clerk of the Circuit Court are authorized to pay such juror for his attendance must be answered in the affirmative. Under Section 98, supra, he is clearly entitled to three dollars for each day's services as a juror.

The second inquiry of your request as to whether you are authorized to pay such juror mileage from Mobile to Centerville and return to Mobile must be answered in the negative.

This office in an opinion under date of November 20, 1936, to Hon. John R. Matthews, Clerk of the Circuit Court, Montgomery County, Quarterly Report Attorney General Vol. V, page 91 (to which you refer in your request), held that a juror summoned for jury duty in Montgomery County and who was temporarily working in Atmore, Alabama, was not entitled, under the provisions of Section 3760 of the Code of Alabama 1923, to mileage from Atmore to Montgomery and return, but was only entitled to mileage from

his residence in Montgomery County to court and return.

It is my opinion that the conclusion reached in this opinion is correct, and is applicable in the present instance.

Section 3760, Code of Alabama, 1923, which section was in force and effect at the time the above referred to opinion was rendered, was brought forward into the Code of Alabama of 1940 under Title 11, Section 98, supra.

I construe the emphasized portion of Section 98, supra, to mean each mile traveled by a juror in going to and returning from court from his residence in the county and not from a place outside of the county.

In your request you state that there appears to be a conflict between the opinion referred to above and an opinion of this office to Hon. S. L. Johnson, Clerk and Register of the Circuit Court of Calhoun County, under date of August 21, 1937 (Quarterly Report Attorney General, Vol. VIII, page 166).

The opinion to Mr. Johnson to which you refer held that a person summoned for jury duty in a county from which he had moved, is entitled to mileage to and from his new permanent home, if in Alabama.

Having concluded that the opinion to Mr. Matthews referred to above is correct, and that Title 11, Section 98, Code of Alabama 1940 has reference to miles traveled by a juror in the county of his residence, it is my opinion that the opinion to Mr. Johnson is in direct conflict with the opinion rendered to Mr. Matthews.

The opinion rendered by this office to Hon. John R. Matthews, Clerk of the Circuit Court of Montgomery County, under date of August 21, 1935 (Quarterly Report Attorney General, Vol. V, page 91) is hereby affirmed. The opinion to Hon. S. L. Johnson, Clerk and Register of the Circuit Court of Calhoun County, (Quarterly Report Attorney General, Vol. VIII, page 166) is hereby expressly overruled and withdrawn.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 5, 1943.

Hon. Robert M. Hill,

Associate Member,

Board of Pardons and Paroles,

Capitol.

Pardon and Parole Board—Fines and Forfeitures—Refund thereof.

The Board of Pardons and Paroles of the State of Alabama is without power to refund fines and forfeitures that have been paid into the county treasury.

Opinion by Assistant Attornel General Haynes.

Dear Sir:

Your request for an official opinion bearing date of March 30, 1943, is as follows:

"We have been presented petitions for remissions of forfeitures in cases in which the judgment on forfeiture has been made final and paid. Please advise us if we have jurisdiction and authority to act in such cases; and, if so, to whom our order granting relief be directed and in what manner and from what funds would a refund be made."

In answering your request, I call your attention to Title 42, Section 16, Code 1940, which is as follows:

"§ 16. When board may grant pardons, remit fines and forfeitures; procedure.—In all cases except treason and impeachment, and except in cases in which sentence of death is imposed and not commuted, as is provided by law, the board shall have the authority and power, after conviction and not otherwise, to grant pardons and to remit fines and forfeitures. It shall cause to be entered in a book kept for that purpose the reasons in each case, and must preserve on file all documents on which it acted in the remission of fines and forfeitures and the granting of pardons. No pardon shall relieve from civil and political disabilities unless specifically expressed in the pardon."

You will note from the above that the power is only conferred on your Board to remit fines and forfeitures and not to refund the same. You can act only when such fines and forfeitures are not paid and remitted to the county treasury but when they are paid to the proper authority this settles the judgment against the principal and his sureties on such bond and the amount received when paid to the county treasury at once becomes a part of the fine and forfeiture fund of the county or, as in some counties as provided by local law, the general fund of the county and has passed beyond your power to refund in part or in whole.

There is no provision of law whereby you could order a refund as the statute above quoted does not refer to a refund but is limited to remittals.

Webster defines the word "remit" when referring to its legal meaning as follows:

"To refrain from exacting, inflicting or enforcing as to remit penalty or the performance of an obligation."

Again your authority to remit a fine or forfeiture ends as soon as such fine or forfeiture becomes a vested right. **25 C. J. 1169.** And certainly this is true where such fine and forfeiture has been paid into the county treasury. Those who have claims against this fund have a vested right in such fine or forfeiture that cannot be defeated by a refund. **Fischel v. Miller,** 55 Ark. 344, 18 S. W. 238; **Hendrick v. Reid,** 137 Ark. 454; **Smith v. State,** 26 Tex. A. 49, 9 S. W. 274.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 5, 1943.

Hon. H. G. Dowling,

Commissioner of Revenue,

Capitol.

Sales Tax—Discounts—Interest—Code 1940, Tit. 51, §§ 756, 764, 785—

Department of Revenue is not authorized to allow discount provided by Code 1940, Tit. 51, § 785 for prompt payment of sales taxes or to relieve taxpayer of payment of interest thereon in cases where the Department is satisfied that a remittance of the tax was mailed before delinquent and in the ordinary course of the mail would have been received by the Department before delinquency but was not actually received until after delinquency, although in view of such circumstances the Department waives the penalty.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of March 11, 1943, is as follows:

"Re: Sales Tax, (Waiver of penalty, interest and allowances of 3% discount).

"Under the provisions of Section 764, Title 51, Code of Alabama 1940, the State Department is authorized, if a good and sufficient reason is

shown, to waive or remit the penalty imposed on any taxpayer who fails to pay the sale tax within time required by law.

"A question arises as to whether the State Department of Revenue is authorized to allow the 3% discount allowed to a taxpayer under the sales tax, and to relieve such taxpayer of interest, in cases where the Department is satisfied that a remittance for the tax was mailed before delinquent, and in the ordinary course of the mail would have been received by the Department before the 20th but was not actually received until after such due date, and where the Department, in view of such circumstances, waives or remits the penalty.

"Your official opinion on the above mentioned question is hereby respectfully requested."

Payment is the discharge of an obligation or liability and, unless otherwise authorized or stipulated by payee and payor, must be made by delivery of money. Ordinarily it is "the duty of the debtor to seek the creditor for the purpose of making payment." 48 **C. J.** 592, § 8.

Under Code 1940, Tit. 51, § 756, the sales tax is payable on or before the 20th day of each calendar month to the Department of Revenue, at the State Capitol, in Montgomery. Time is of the essence of the obligation as shown by Section 764 of said Title 51, which imposes a penalty for delinquency, together with interest. While the Department "for good and sufficient reason," may waive the penalty, no such authority is vested in it by the statute with respect to the payment of interest. **Expressio unius exclusio est alterius.**

Likewise with reference to discounts for prompt payment pursuant to Section 785, there appears no authority for "allowance" thereof except upon strict compliance with the statute. In fact the statute expressly forbids such allowance "upon any taxes which are not paid before delinquency."

Furthermore with reference to payment of obligations or liabilities it is said: "Payment is not affectuated by sending the amount due the creditor by mail or other public carrier until the remittance gets into the hands of the creditor, unless he expressly or by implication directs or consents that payment be so made ***, " 48 **C. J.** 594.

I find nothing in the sales tax law from which it can be implied that the taxpayer is authorized to pay the tax by deposit of a remittance in the mails. In such cases the postoffice is the taxpayer's agent, and not the department's agent, and the taxpayer assumes the risk of loss or delay. See **State ex rel Attorney General,** 185 Ala. 347, 64 So. 310.

I am of opinion, therefore, that the Department is not authorized to allow the discount aforementioned or to relieve the taxpayer from payment

of interest in cases and under the circumstances above stated in your request for this opinion.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 6, 1943.

Hon. I. C. Heck,

State Comptroller,

Capitol.

Naval Leave—United States Naval Reserve—Deputy Solicitor—Title 35, Section 12, Code of Alabama 1940.

Deputy Solicitor holding a commission as an officer in the United States Naval Reserve, when ordered to active duty is entitled to naval leave, and twenty-one working days' pay from time he leaves his employment.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion, bearing date of March 31, 1943, is as follows:

"Title 35, Section 12, Code of Alabama, 1940, refers to 21 days military or naval leave of absence for all officers and employees of the State of Alabama, etc.

"We refer you to Quarterly Report of the Attorney General, Vol. 24, Page 195, which refers to military leave for reserve officers assigned to civilian conservation corps camps.

"However, we would like to have your official opinion with reference to the following: A deputy solicitor of a judicial circuit who is paid through the State payroll was appointed Lt. (jg) in the Naval Reserve on March 10, 1943, with rank from February 6, 1943. He was sworn in on March 22, 1943, and ordered to active duty March 29, 1943.

"Would it be construed this State employee would be a member of the Officers Reserve Corps of the United States Naval Reserve as referred to in Title 35, Section 12 of the Code of Alabama, 1940, and, therefore, be entitled to pay for the 21 working days leave?

"Of course, a deputy solicitor does not come under the Merit System

regulations of the State of Alabama."

The provisions for military or naval leave are set out in Title 35, Section 12, Code of Alabama 1940, which section enumerates the employees entitled to such leave, and provides for the type of service they must render to be entitled to the same. This section is as follows:

> "§12. Military leave for government employees.—All officers and employees of the State of Alabama, or of any county, municipality, or other agency or political subdivision thereof, who shall be active members of the Alabama national guard or naval militia, or of the officer's reserve corps of the United States Army, or of the United States naval reserves, shall be entitled to military or naval leave of absence from their respective civil duties and occupations on all days that they shall be engaged in field or coast defense or other training or on other service ordered under the provisions of this chapter, or of the national defense act, or of the federal laws governing the United States naval reserves, without loss of pay, time, efficiency rating, annual vacation, or sick leave, but no such person granted such leave of absence with pay shall be paid for more than twenty-one working days at any one time."

Members of the United States Naval Reserve may be ordered to active duty under the provisions of Title 34, Section 853c, U. S. C. A., which section reads in part as follows:

> "§853c. Active duty in peace and war; release from active duty. Any member of the Naval Reserve, including those on the honorary retired list created by section 855h, of this title, or who may have been retired, may be ordered to active duty by the Secretary of the Navy in time of war or when in the opinion of the President a national emergency exists and may be required to perform active duty throughout the war or until the national emergency ceases to exist; *** ."

Under the provisions of Section 12, supra, an active member of the United States Naval Reserves is entitled to naval leave from his civil duties and occupation on all days that he is engaged in service ordered under the provisions of the Federal laws governing the United States Navy Reserves without loss of pay, but no such person shall be paid for more than twenty-one working days at any one time.

In my opinion the deputy solicitor of a judicial circuit who received his appointment as an officer in the United States Naval Reserves on March 10, 1943, was sworn in as such officer on March 22, 1943, and ordered to active duty on March 29, 1943, is entitled to naval leave of absence provided by Section 12, supra, and is also entitled to twenty-one working days' pay from the time he leaves his employment. Cf. Quarterly Report of the Attorney General, Vol. XXIII, page 67.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 12, 1943.

Dr. B. F. Austin,

State Health Officer,

Department of Public Health,

Capitol.

Bureau of Vital Statistics—Veterans—

1. Bureau of Vital Statistics is not required to furnish free birth certificates and death certificates or other official records on file in its office to veterans, unless such records are for the purpose of obtaining benefits from the United States Veterans Bureau.

2. Persons in the armed forces of the United States at this time are not veterans within the meaning of Chapter 8, Title 21, Code 1940, unless such persons are veterans of World War No. 1, and are not, therefore, entitled free of charge to official records on file in the Bureau of Vital Statistics.

Opinion by the Acting Attorney General.

Dear Sir:

Your request for an official opinion bearing date of April 6, 1943, is as follows:

"I have received a request from Major W. M. Weston, State Service Commissioner, to furnish copies of our records on file in the Bureau of Vital Statistics without cost to persons now on active duty with the armed forces of the United States, as well as to veterans of World War No. 1.

"This letter is written to ascertain whether or not, in your opinion, the Bureau of Vital Statistics of the State Health Department is authorized to supply copies of birth and death certificates or other offical records without cost to veterans of World War No. 1 and their families, or to persons in the armed forces of the United States at this time."

In answer to your request, your attention is directed to Section 174, Title 21, Code 1940, which is as follows:

"§ 174. Copies of records to determine eligibility for benefits.—Whenever a copy of any public record is required by the bureau to be used in determining the eligibility of any person to participate in benefits made available by such bureau, the official charged with the custody of such public record shall without charge provide the applicant for such benefits or any person acting on his behalf or the representative of such bureau with a certified copy of such record."

Section 160, Title 21, Code 1940, is as follows:

> "§160. Definitions.—The term 'person' includes a partnership, corporation or an association. The term 'bureau' means the United States veterans' bureau or its successor. The term 'estate' and 'income' shall include only moneys received by the guardian from the bureau and all earnings, interest and profits derived therefrom. The term 'benefits' shall mean all moneys payable by the United States through the bureau. The term 'director' means the director of the United States veterans' bureau or his successor. The term 'ward' means a beneficiary of the bureau. The term 'guardian' as used herein shall mean any person acting as a fiduciary for a ward."

It is plain from the foregoing section that only those persons who are entitled to benefits from the United States Veteran's Bureau are entitled to free copies of public records, when such records are to be used by the Bureau in determining the eligibility of such persons for benefits made available by the Veterans' Bureau. The plain verbiage of this statute, in my opinion, precludes those persons now in the armed forces of the United States from obtaining free copies of the records on file in the Bureau of Vital Statistics for the reason that they are not veterans within the meaning of Chapter 8, Title 21, and are not entitled to any benefits made available by the United States Veterans' Bureau.

It will be noted from Section 160, Title 21, Code 1940, that the term "ward" means a beneficiary of the Bureau. I do not see how a person now in the armed forces of the United States could be a ward within the meaning of this chapter.

A complete answer to your question can be summed up as follows: If a person is entitled to benefits made available by the United States Veterans' Bureau and desires copies of records on file in the Bureau of Vital Statistics to be used in determining the eligibility of such person for such benefits, then he is entitled to a free copy of any records on file in the Bureau of Vital Statistics. If such records on file in your office are to be used for any other purpose other than to determine the eligibility of a veterans for benefits made available by the United States Veterans' Bureau, then there is no legal obligation for the Department to furnish such person with free copies of records on file in its office. This is true whether such person be a veteran of World War 1 or now in the armed forces of the United States.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 15, 1943.

Hon. L. A. Hixon,

Clerk Circuit Court,

Monroeville, Alabama.

Costs—criminal forfeitures—

In all cases where the defendant has forfeited his bond, conditional judgment rendered and notice issued and served on the defendant and his bondsmen and on the hearing the court, for any reason, sets said forfeiture aside without taxing the costs against the sureties, the costs in such cases be paid by the county.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion, bearing date of April 9, 1943, is as follows:

"In cases where a judgment nisi is rendered against the principal and sureties on a forfeited bail-bond, in the name of the State for the use of a certain County, and the Circuit Clerk issues scire facias or notices to the defendants and the Sheriff serves the same on them; and upon hearing the excuses of default, the Court set aside the conditional judgment, is the Circuit Clerk and Sheriff entitled to the fees under Section 11 No. 21 and Section 11 No. 34? Should the County be taxed with said fees Can the County pay said fees from the general fund?

"I find authority for the proposition that a suit of this nature, on a forfeited undertaking of bail, is a civil suit, not a criminal one (40 Ala. 718, 4 Ala. 673) that is it commences to be a civil action from the issue of the notice or scire facias against the obligors, which answers the place of a summons and complaint in an ordinary suit.

"It is provided by Section or Title 11 No. 65 that 'the successful party in all civil suits is entitled to full costs for which judgment **must** be rendered,' and that this provision is made applicable to the State itself, where it is a party plaintiff. In Title 11 No. 71, it is provided 'when judgment is rendered against the plaintiff, in any suit brought in the name of the nominal plaintiff for the use of another, judgment for the costs **must** be rendered against the beneficiary, or his personal representative. Counties are body corporate, liable to sue and be sued as natural persons may be.

"It is my opinion that where such a suit is set aside or dismissed the County is taxed with the costs as above provided and that the Circuit Clerk is entitled as part of the costs his fee for issuing 'sci. fas.' and the Sheriff a fee for serving and returning the same. The costs can be taxed against the County under authority of State v. Parker, 83 Ala. 269,

3 So. 552, and Rep. Atty. Gen. 1934-36, p. 556.

"I am aware of the fact that costs taxed against the State could not be collected by suit, but the County is willing to pay the costs to encourage zealousness among its officers. Rep. Atty. Gen. 1920-22, p. 140 and 1928-30 p. 137.

"I would appreciate it if you will answer the following questions in regard to this matter:

"1. Can the County be taxed with costs of such suits when the same is set aside or dismissed?

"2. Is an order of the Court necessary to tax the costs against the County?

"3. If the cost can be taxed against the County, is the Clerk and Sheriff entitled to the above mentioned fees as part of the costs?

"4. If the costs can be taxed against the county, can the county pay the same?"

My answer to each and every one of your questions is in the negative.

It is true that our Supreme Court in the case of **State for the use of Coosa County v. Parker,** 83 Ala. 269, held that such costs as you refer to above could be taxed against the county and judgment rendered for same if the county was the beneficial plaintiff. However, the Supreme Court in the later case of **Copeland v. Jefferson County,** 192 Ala. 12, 68 So. 285, had occasion to consider the same question as that considered in the Parker Case. The Supreme Court in the Copeland Case dismissed at length the Parker Case and in effect overruled same. The holding in the Copeland Case is to the effect that where a conditional judgment was set aside for good cause the costs could not be taxed against the county. The reasoning in this case is, in my opinion, sound and supersedes the holding announced in the Parker Case.

Therefore, it is my opinion that the county is without authority of law to pay such costs out of any funds of the county. It might be well in this connection to call your attention to the case of **State ex rel. C. T. Pollard, Jr. v. Willis Brewer, Auditor,** 59 Ala. 130.

I call attention to an opinion of this office written November 27, 1929, to Board of Revenue, Shelby County, Columbiana, Alabama, Biennial Report of Attorney General, 1928-30, page 686. This opinion is based on the case of **Coosa County v. Parker,** 83 Ala. 269, supra, and holds a contrary view from the one we take above and is, therefore, overruled and held for naught.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 16, 1943.

Hon. E. E. Byars,

Clerk of County Court,

Lawrence County,

Moulton, Alabama.

Lawrence County—County Solicitor—Solicitors' fees—Local Acts of Alabama, Special Session 1920, page 171—Local Acts of Alabama 1927, page 375—Title 11, Sections 85 and 86, Code of Alabama 1940.

Neither County Solicitor of Lawrence County who resigned on February 22, 1943, nor County Solicitor appointed on March 26, 1943, is entitled to Solicitors' fees in cases where judgment of conviction was rendered in the County Court on March 1 and March 4, 1943. Such Solicitors' fees should be paid into the County Treasury of Lawrence County under the provisions of Title 11, Section 86, Code of Alabama 1940.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for an official opinion bearing date of April 8, 1943, is as follows:

"I now have in my possession as Clerk of the County Court of Lawrence County, Alabama, the sum of $40.00, representing the Solicitor's fee in two cases in the County Court. The judgments of conviction in these cases were rendeerd by the Court on March 1st. 1943 and March 4th. 1943.

"Mr. Earl Proctor, who was elected County Solicitor in Nov. 1942, took office in January, 1943, and held the same until about the 22nd. day of Feb. 1943, at which time he resigned. His resignation was tendered to the Governor before the dates of conviction in the two cases. Mr. Jas. P. Miller was appointed County Solicitor on March 26th. 1943, to succeed Mr. Proctor. At the time of the convictions in these cases, we had no Solicitor for Lawrence County.

"Will you therefore, kindly advise me, what disposition I should make of this sum of money? That is, whether or not it lawfully belongs to Mr. Proctor, or Mr. Miller, and if not to either of them then what disposition should be made of it?

"With regard to the office of County Solicitor for Lawrence County, I refer you to the following statutes and cases.

"Local Acts of Alabama, 1919, page 86, et seq.

Local Acts of Alabama, 1920, Sp. Sess. page 171.

Local Acts of Alabama, 1927, page 375.

Jackson Vs. Sherrod, 207 Ala. 245,-92 So. 481.

England Vs. State—240 Ala. 76-197 So. 365."

The office of County Solicitor for Lawrence County, Alabama was created by Local Acts of Alabama 1927, page 375 which Act provides as follows:

"Sec. 3. The office of county solicitor hereby created shall be clothed with all the powers and shall be charged with all the duties given or imposed on the Deputy Solicitor of said Lawrence County under any laws now in force or hereafter passed and adopted by the legislature of this state.

"Sec. 4. The County Solicitor of Lawrence County shall receive the same fees and compensation now allowed the Deputy Solicitor of said County.

"Sec. 5. It is the intention of this act that said County Solicitor shall take the place of the Deputy Solicitor of said County and prosecute in all cases in which a Deputy Solicitor is required to prosecute. And that all laws now in force pertaining to the Deputy Solicitor of Lawrence County shall remain in force and apply to the County Solicitor hereby created except those in conflict with the provisions of this act."

It will be seen from Section 4, supra, that the County Solicitor of Lawrence County "shall receive the same fees and compensation now allowed the Deputy Solicitor of said County." At the time of the passage of the Local Act of 1927, supra, the fees allowed the Deputy Solicitor of Lawrence County were provided for in Local Acts of Alabama, Special Session 1920, page 171, which Act amended Section 10 of the Local Acts of Alabama 1919, page 86. The Local Act of 1920 provides as follows:

"That Section 10 of an Act entitled an Act to regulate the trial of misdemeanors in Lawrence County, approved August 29th, 1919, be amended so as to read as follows:

"Section 10. Be it Further Enacted, that the Deputy Solicitor for the county, shall be the solicitor for the county court and shall prosecute for the state all causes in said county court, and for so doing, he shall receive the same fees as are now or may be hereafter provided by law, to be collected and paid to him in the manner provided for by Section 6634 of the Alabama Code of 1907. If there be no Deputy Solicitor for Lawrence County then the Solicitor for that Judicial Circuit, of which Lawrence County is a part, shall appoint a solicitor for Lawrence County, whose term of office shall be concurrent with the term of office of the Solicitor appointing him and such county solicitor so appointed, shall prosecute all cases in said court, and shall receive the same fees, to be collected in the same manner, as are herein provided; provided however, that in all cases where a plea of guilty is interposed by the defendant, no solicitors fee shall be taxed or collected, in excess of the amount of the fine assessed."

Under the provisions of the Local Act of 1920 set out above it was the duty of the Deputy Solicitor of Lawrence County to prosecute for the State all causes in the County Court, "and for so doing" he was to receive the fees then or thereafter provided by law, to be collected and paid to him under the provisions of Section 6634, Code of Alabama 1907 (Title 11, Section 85, Code of Alabama 1940).

I construe the Local Act of 1920 to mean that the Deputy Solicitor was to receive the Solicitor's fee when he prosecuted the case for the State in the County Court, and that if he did not prosecute the case he was not to receive the Solicitor's fee. It follows that since the fees and compensation allowed to the County Solicitor are governed by the Local Act of 1920, supra, that he would only be entitled to the Solicitor's fees in those cases he prosecuted for the State in the County Court.

It is my opinion that neither Proctor, who resigned as County Solicitor of Lawrence County on February 22, 1943, nor Miller who was appointed as such Solicitor on March 26, 1943, is entitled to the Solicitor's fees referred to in your request. On March 1 and March 4, 1943, the dates on which the judgments of convictions were entered in the County Court, Proctor had resigned as County Solicitor, and Miller had not received his appointment as such Solicitor. Neither of these parties having prosecuted the cases in the County Court they are not entitled to the Solicitor's fees.

The question remains as to what disposition should be made of these fees.

It is my opinion that these fees should be paid into the County Treasury of Lawrence County, Alabama, as provided by Title 11, Section 86, Code of Alabama 1940, which Section is as follows:

> "§ 86. Solicitors' fees; how taxed and collected.—For every conviction for a misdemeanor in the county courts or inferior courts there shall be taxed and collected as a part of the costs and paid into the county treasury the same solicitor's fees provided for conviction in such cases in the circuit court, provided that in the event of an appeal to the circuit court no solicitor's fees shall be taxed or collected for the services of a solicitor in the circuit court."

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 19, 1943.

Hon. John T. Frazier,

Judge of Probate,

Lee County,

Opelika, Alabama.

Lee County—Local Acts 1935, pp. 111, 171—Assessment and Collection of Municipal Taxes—Compensation of Judge of Probate.

Under Local Acts 1935, pp. 111 and 171 Judge of Probate of Lee County not entitled to compensation of $50 annually or other compensation for furnishing and making abstract books in connection with assessment and collection of taxes for the cities of Opelika and Auburn.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of April 10, 1943, is as follows:

"Will you please give me your opinion on the following questions:

"1. Are the Cities of Opelika and Auburn, in this Lee County, liable to me as Judge of Probate for the annual payment of $50.00 each (or any lesser amount), under the following facts and circumstances?

"2. If so, is this annual payment of $50.00 due me personally as Judge of Probate, or should it go into the general funds of the county?

"Local act approved July 17, 1935 (Local Acts 1935, p. 111) provides for the assessment, levy and collection of the municipal taxes of the City of Auburn by the Lee County Tax Assessor and Collector, respectively. There is a similar act relating to the assessment and collection of Opelika taxes (Local Acts 1935, p. 171).

"You will note that these local statutes provide for the keeping of books relating to assessment and collection, the Assessor to keep map and plat books, etc. Section 35 of the Auburn act provides that the Tax Assessor is to receive as **'full compensation for all the duties to be performed by him'** under the act an amount equivalent to 1 percentum of all taxes collected for the City of Auburn. Section 36 provides the Tax Collector shall receive a sum equivalent to ½ of 1 percentum for his services.

"Sections 35 and 36 of the Opelika act has similar provisions, except that under that act the Tax Assessor receives ½ of 1 percentum instead of 1 percentum as set out in the Auburn act.

"These two acts do not require the Judge of Probate to furnish and prepare abstract books (these now being prepared by the Tax Assessor, who bills the county therefor under the provisions of Sections 66 and 67 of Title 51, Code of 1940. The county has by order of the Court of County Commissioners paid to the Tax Assessor the amount necessary to purchase the various books required by law, and for the preparation of the map and plat books, no part of this expense having in turn been billed to Opelika and Auburn.

"As above stated these books are prepared and kept by the Tax Assessor, who according to the two local acts relating to Opelika and Auburn, receives a percentage of the taxes collected as **full compensation** for his services. And yet Section 37 of each of the two local acts (Opelika and Auburn) contains the following:

> " 'The Judge of Probate of Lee County shall be entitled to a fair and reasonable compensation, not in excess of $50.00 in any year, from the City of Opelika (Auburn) for the additional services required of him in furnishing and preparing abstract books conforming to the requirements of this act, the amount to be determined and fixed by the governing body of the City of Opelika (Auburn), and to be paid by the Tax Collector of the County on the certificate of the governing head of the City of Opelika (Auburn) to the Judge of Probate.'

"I have not since these two local acts were passed in 1935 billed the City of Auburn or Opelika for any amount in connection with the preparation of books of assessment, until a few days ago when I sent statements for $350.00 each to Opelika and Auburn, being $50.00 per annum to each of the two cities for the 7 year period 1936-1942, both inclusive.

"The point is now raised that inasmuch as these two local acts do not prescribe and direct the Judge of Probate to keep these map, plat or abstract records, but does provide for the keeping of same by the Tax Assessor, and that the acts provide for percentages to him as **full compensation** for his services, there is no service performed by the Judge of Probate for which he is entitled to compensation as set out in the two acts (Sections 37 thereof).

"You will note also that Section 37 of each of the acts provides the amount is to be fixed by the governing bodies of the municipalities 'not in excess of $50.00 per year.' In the event these governing bodies failed to approve any amount, or fixed a nominal amount, what re-course would I, as Judge of Probate, or Lee County, have in the premises?"

The ex officio duties attaching to the office of the Judge of Probate of Lee County under the acts in question (Local Acts 1935, pages 111, 171) are enumerated in Sections 21, 24, 27, and 31 of each act. In none of said sections, nor elsewhere in either of the acts, do I find any requirement that the Judge of Probate should furnish or prepare "abstract books" in connection with assessment or collection of municipal taxes or any other of the purposes of said acts.

The only provision in either act for compensation to the Judge of Probate

for the services required of him thereunder is found in Section 37 of each act. Under said section for his services in connection with redemption from tax sales in behalf of the city compensation is payable in the form of a commission. The only other mention of compensation for services in said section is "for furnishing and preparing abstract books" as aforesaid. In said section there is no provision made for compensation for services required under Sections 21, 24, and 31, supra.

With reference to the compensation of public officers for performing services imposed upon them by law, it was said in **Torbert v. Hale County,** 131 Ala. 143, on page 145, 30 So. 453.

> "It is of no consequence that the law imposes the duty upon the plaintiff to perform the services alleged to have been performed if there is no provision compensating him for it. 'Those who accept public offices, which require them to render services to the State, must take the office **cum onere**—the rendition of such services gratuitously, unless, by express statutory provision, compensation is fixed, and an express liability for its payment imposed.' "

To the same effect is the more recent case of **McElderry v. Abercrombie,** 213 Ala. 289, 104 So. 671. See also 46 **C. J.** 1019, § 250, and cases cited under Note 94.

I am of opinion, therefore, that as Judge of Probate of Lee County, you are not authorized to collect compensation from the cities of Auburn and Opelika for services rendered under the aforementioned local acts otherwise than as provided in Section 37, thereof, and that, inasmuch as admittedly under said acts you are not required to furnish and prepare "abstract books" and have not, in fact, furnished or prepared such books at any time, you are not entitled to $50 per year, or any other compensation for furnishing and preparing such books.

This conclusion makes it unnecessary to answer the remaining questions you have propounded.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 20, 1943.

Hon. E. L. Roberts,

County Attorney,

Etowah County,

Gadsden, Alabama.

Commissioners' Court—Boards of Revenue—Allowance of claims filed against the county—

All claims fixed by law, such as salaries, etc. are what are termed fixed claims and do not have to be audited and allowed by the commissioners' court or Board of Revenue. All other claims have to be filed, audited and allowed by the commissioners' court before same can be paid.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion bearing date of March 31, 1943, is as follows:

"As County Attorney of Etowah County I hereby respectfully request your opinion as to whether or not Hon. J. W. Sharpton, as President of the Board of Revenue of Etowah County, Alabama, is entitled to the $3.00 per day that is allowed for holding commissioner's court for Etowah County during the years 1937, 1938 and until September 9, 1939, and as to whether or not it was necessary for Mr. Sharpton to file his claim for said services? He did not file his claim for this service until January, 1943.

"Further, is Mr. Sharpton, as President of the Board of Revenue, entitled to the fifteen cents per one hundred words for recording the minutes?

"The clerks that record the minutes are paid a salary out of the county's funds."

In a recent opinion of this office written March 12, 1943, to Hon. J. W. Sharpton, President of Board of Revenue, Etowah County, we held that the President of said Board was entitled, besides his salary of $1,200 per annum, to $3 per day for acting as Principal Judge of said Board and to fifteen cents per one hundred words for recording the minutes.

Now you request our opinion as to whether or not the statute of limitations has run against these claims.

You state that these claims cover a period of years—1937, 1938 and up to September 9, 1939, and up to the present time the former President of the

Board has not filed his claims with the Board of Revenue for such services, or, if filed, it is of recent date, to be audited and allowed.

It is my opinion both of these claims, the one for $3 per day for acting as Principal Judge of said Board and the one for fifteen cents per one hundred words for recording the minutes of said Board, are barred by the statute of limitations of twelve months under Title 12, Section 118, Code 1940 (Section 228, Code 1923), which is as follows:

> "§ 118. Claims barred if not presented.—All claims against counties must be presented for allowance within twelve months after the time they accrue, or become payable, or the same are barred, unless it be a claim due to a minor, or to a lunatic, who may present such claim within twelve months after the removal of such disability."

Each of these claims are of such nature as to take them out of the class of fixed claims, such as fixed salaries or stated amounts. For instance, the claim of $3 per day as Principal Judge he would have to file a claim for same showing how many days the President presided as Principal Judge, giving the dates and the terms of the court and this would have to be audited and allowed by the Board. Then in order to collect the fifteen cents per hundred words for recording the minutes, etc. he would have to count the words in all the minutes and the Board of Revenue would have to check his account to see that it was correct before it could audit and approve same. So you see neither of these claims are fixed in a sum certain. This being true, the statute of limitations of twelve months, supra, would bar all such claims. A claim against the county, in order to be paid without being audited and approved by the Board of Revenue of the county, must be certain and fixed. Quarterly Report, Attorney General, Vol. IV, page 25; Biennial Report, Attorney General, 1926-28, page 41; **Mobile County v. Barnes,** 225 Ala. 127; **Lovelady v. Loveman, Joseph & Loeb,** 191 Ala. 96; Quarterly Report, Attorney General, Vol. 8, page 189.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 21, 1943.

Mr. B. P. Singleton,

Chief Examiner of Public Accounts,

Finance Department,

Capitol.

Audits—Municipalities—Examiner of Accounts—Title 37, Sections 81, 109, 292, 445 of the Code of 1940.

1. Duty of city with commission form of government under Article 1, 1940 Code, to make annual audit of books and affairs as prescribed in Section 81, Title 37.

2. Duty of city with commission form of government under Article 2, 1940 Code, to make audits of books and affairs prescribed in Section 109, Title 37.

3. All other municipalities shall make annual audits of books and affairs as prescribed in Section 445 of Title 37.

4. Every municipality required to make audit under Section 292, Title 37, to issue public improvement bonds.

Opinion by Assistant Attorney General Lurie.

Dear Sir:

Your request for an official opinion, bearing date of April 5, 1943, is as follows:

"Please refer to Title 37, Sections 81, 109, 292, and 445, Code of 1940, and note that in Section 292 audits are required of municipalities biennially where the population is less than two thousand and annually where the population is over two thousand.

"Section 445 requires an annual examination in all cities and towns.

"1. Please advise which of these four Sections would control in towns and cities with a Mayor and Council form of government.

"2. Please advise which of these four Sections would control in towns and cities with a Commission form of government.

"3. Please advise which of these four Sections would control with a City Manager form of government."

For answer to the interrogatories propounded by you, it is necessary to give careful study to the sections in Title 37 of the 1940 Code of Alabama

to which you make reference, to the chapters, articles and subdivisions in which they are contained, in conjunction with the application intended by each.

Section 445, Title 37, 1940 Code of Alabama provides as follows:

"Section 445. ACCOUNTANT, EXPERT, EMPLOYED; DUTIES OF. —In cities and towns the mayor shall at least once a year, appoint an expert accountant who shall make an examination in detail of all books and accounts of the city officials to cover the period since the preceding examination, and make a full report thereof in writing, under oath, to be submitted to the council at its first meeting after the completion of such report, and the same shall be spread upon the minutes of the council, but the same person shall not be appointed or authorized to make such examinations twice in succession. For his services said accountant shall be paid such sum as may be agreed upon."

This section finds its origin in the 1907 Code of Alabama and was carried forward in the 1923 Code and reenacted in our present Code. The duty placed upon a municipality to have an examination or audit of its books and accounts bases its foundation upon this statute and the requirement that such audit or examination be made annually is applicable to all cities and towns in the State of Alabama with the exception of the distinctions employed herein.

Section 81, Title 37, 1940 Code of Alabama provides as follows:

"Section 81. ANNUAL EXAMINATION OF BOOKS AND ACCOUNTS.—At the end of each year the commission shall cause a full and complete examination of all the books and accounts of the city to be made by competent accountants, and shall publish the result of such examination in the manner above provided for publication of statements of quarterly expenditures and the governor may, at any time, have all the books and accounts of such city examined by a state examiner of public accounts, the cost of such examination to be paid by such city upon the presentation of the president of the board of commissioners of such city of a duly verified statement of such expenses made by such examiner of public accounts, approved by the governor."

Section 81, supra, is contained in Chapter 4, Article 1 of said Title 37 which provides for a commission form of government for certain cities and towns and the rights, duties and powers are defined therein. Such type of municipal government was apparently not in existence at the time of the origin of Section 445, supra, and, since a departure from the usual type of municipal government was inaugurated, Section 81, supra, was enacted requiring cities in the State of Alabama, operating under the provisions of Article 1 of Title 37, to make an annual audit or examination of its books and accounts.

Article 2, Title 37 of the 1940 Code of Alabama provides for an additional or optional form of commission government, and municipalities in the State of Alabama seeking to exercise the rights and privileges under this form of government come within the scope of Section 109 of said Title 37 which pro-

vides as follows:

"Section 109. EXAMINATION OF BOOKS AND ACCOUNTS; STATEMENTS.—The commission shall each month print in pamphlet form a detailed statement of all receipts and expenses of the city and a summary of its proceedings during the preceding month and furnish printed copies thereof to the daily newspapers of the city, and to persons who apply therefor. At the end of each year the commission shall cause a full and complete examination of all the books and accounts of the city to be made by competent accountants and shall publish in pamphlet form the result of such examination in the manner above provided for publication of statements of monthly expenditures. The governor is authorized at any time to have all the books and accounts of such city examined by a state examiner of public accounts, the cost of such examination to be paid by such city upon the presentation to the president of the board of commissioners of such city of a duly verified statement of such expense made by such examiner of public accounts, approved by the governor."

Thus, it may be seen that there are three distinct types of municipal governments in our state, and for each of such types of government there has been provided a code section placing the duty upon such type of municipality to cause to be made an examination or audit of its books and accounts.

In the event that either of the above types of municipal governments shall desire to issue or sell public improvement bonds, then, Subdivision 1, Article 2 of Title 37 prescribes the method therefor and among the provisions of said Subdivision 1 is the method of audit prescribed in Section 292 thereof, applicable to all municipal governments, which provide as follows:

"Section 292. AUDITS.—There shall be an annual audit by a certified public accountant or other disinterested public accountant of every municipality having, according to the last or any subsequent federal census as much or more than two thousand population, and an audit biennially for municipalities with less than two thousand population according to the last or any subsequent federal census. Said audit shall describe in detail each bond issue outstanding and shall disclose the provision made for payment thereof. In the case of assessment bonds it shall show the amount of assessments twelve months or more past due pledged for the payment of each series of bonds and the amount of all other assessments and the estimated deficit, if any, to be paid out of the general revenues of the municipality. One copy of such audit shall be filed with the clerk of the municipality."

In my opinion a city manager employed by any municipality within the State of Alabama, under the provisions of Article 2, Chapter 8, of Title 37 of the 1940 Code of Alabama, would have no bearing upon the inquiries you have presented. Section 418, Title 37, 1940 Code of Alabama provides as follows:

"Section 418. EMPLOYMENT OF CITY MANAGERS AUTHORIZED.—All municipalities in the State of Alabama which, according to the last or any succeeding federal census, have a population of not less than twenty-five hundred and not more than fifteen thousand, and whether

now or hereafter operating under a municipal government consisting of a mayor and aldermen or of a city commission, be and the same are hereby authorized at their discretion to employ a city manager, with the authority, duties and liabilities hereinafter described, whose term of office and compensation shall be as hereinafter prescribed. The authority given under this article to employ a city manager and to invoke the provisions hereof shall be exercised by the passage of an ordinance or resolution by the governing body of the municipality so desiring to employ a city manager, which ordinance or resolution shall set a date not less than thirty nor more than sixty days following the date of its passage upon which the city manager shall assume his office."

Under the provisions of the above quoted section any municipality conforming to the requirements imposed by said Section 418, supra, may employ a city manager, and an exercise of such power would not change the type of municipal government so as to create a form of government not included within the meaning of Sections 81, 109 and 445, supra, hence, we are not concerned with the provisions of Section 418 in a determination of your third question.

To summarize the views expressed herein, the answer to your inquiries, numerically, is as follows:

For answer to your question No. 1: Section 445, Title 37, 1940 Code of Alabama.

For answer to your question No. 2: Sections 81 and 109, Title 37, 1940 Code of Alabama.

For answer to your question No. 3: Sections 445, 81, or 109, Title 37, 1940 Code of Alabama, depending upon the type of government under which the municipality operates.

This opinion does not contemplate the provisions contained in Title 55, Section 6, 1940 Code of Alabama.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

April 23, 1943.

Hon. I. J. Browder, Director,

State Personnel Department,

Capitol.

License Inspectors—Merit System—

License Inspectors not under Merit System—

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

This will acknowledge receipt of your request for official opinion dated February 3, 1943, which is as follows:

> "The License Inspectors employed by the Revenue Department who work in the separate counties of the State are not compensated on the regular payrolls that come to my office for certification as other State employees. Therefore, this matter has not come to our attention, and we have not considered them as being under the Merit System. I have recently been requested, however, by a member of the Legislature to get an opinion on the matter. I have not been able to find in our law any provision that bars them from the classified service if they are employees in the 'State service.' I shall, therefore, appreciate your opinion on the matter."

It is my opinion that license inspectors appointed under the provisions of Code of 1940, Title 51, Section 835, are not subject to the provisions of the Merit System.

It will be noted that the various license inspectors receive compensation for their services through certain citation fees and delinquency penalties provided for by Subsections (c) and (g) of Section 835, of Title 51, of the 1940 Code. Such fees and penalties are paid directly to the license inspectors by the various probate judges. Opinion of the Attorney General to Hon. William W. Hill, Judge of Probate, Montgomery County, rendered December 2, 1935, Biennial Report of the Attorney General 1934-36, page 414. It should be noted also that Subsection (h) of Section 385 of Title 51, of the 1940 Code, provides that necessary forms, etc. should be furnished the license inspector by the county.

Referring now to the statutes dealing with the personnel department and the Merit System, it is apparent that license inspectors were not contemplated when Section 304 of Title 55 of the 1940 Code was written. This section provides for the establishment of a pay plan for all employees in the state service. It is as follows:

> "§ 304. Pay Plan.—After consultation with appointing authorities and the state fiscal officers, the director shall prepare and recommend

to the board a pay plan for all employees in the state service. Such pay plan shall include, for each class of positions a minimum and a maximum rate, and such intermediate rates as the director considers necessary or equitable. In establishing such rates the director shall give consideration to the experience in recruiting for positions in the state service, the prevailing rates of pay for the services performed, and for comparabale services in public and private employment, living costs, maintenance or other benefits received by employees, and the state's financial condition and policies. Such pay plan after adoption by the board, shall be submitted to the governor, who shall have the power to revise or alter the plan. Such pay plan shall take effect when approved by the governor. Amendments thereto may from time to time, be made in the same manner. Each employee in the state service shall be paid at one of the rates set forth in the pay plan for the class of positions in which he is employed."

In view of the fact that license inspectors are, as stated above, paid on a fee basis and by the various probate judges, such plan could not possibly apply to them.

Assuming in view of the above, that it was not the legislative intent to place license inspectors under the provisions of the merit system, let us then look to Section 301 of Title 55 of the 1940 Code, which section sets out the various types of service into which all positions in the state service fall, and determines in which category license inspectors properly are. Section 301 provides as follows:

"§ 301. Exempt, classified and unclassified service.—Positions in the service of the state shall be divided into the exempt, the unclassified and the classified service. The exempt service shall include: Officers elected by vote of the people. Officers and employees of the legislature. Officers, attendants and employees of the circuit courts, clerks of county jury boards, and deputy circuit solicitors. Members of boards and commissions, whether appointed or self-perpetuating, and heads of departments required by law to be appointed by the governor or by boards or commissions with the approval of the governor. All officers and employees of the state's institutions of higher learning, teacher training institutions and normal schools; all officers and employees of all educational eleemosynary and correctional institutions which are governed and controlled by boards of trustees or similar governing bodies, the secondary agricultural schools and vocational schools. All inmate help in all charitable, penal and correctional institutions. All commissioned and warrant officers and enlisted men of the national guard and naval militia of the state, in their respective military and naval grades. The governor's private secretary, legal advisor, recording secretary, and those employees of the governor's office paid exclusively out of the governor's emergency or contingent funds. The employees of the state docks commission engaged in railroad service and subject to the provisions of an act of congress known as the railway labor act, as amended or as it may hereafter be amended. The services here listed as exempt, shall in no respect be subject to the provisions of this chapter, anything to the contrary notwithstanding. The unclassified service shall include: One confidential assistant or secretary for each board, commission and elected officer. All employees of the governor's office not exempted. Provided, that these positions in the unclassified service previously enumerated may at the request of the appointing authority, be filled by classified

employees. Each of the employees thus appointed shall, at the conclusion of his occupancy of such position, resume his previous status in the classified service. The classified service shall include all other officers and positions in the state service. **Except as to services denominated as exempt or unclassified services hereinabove, the governor shall have the power by executive order to extend the provisions of this chapter, to include additional positions or classes of positions.** Employees in the unclassified service shall be subject to the same rules and regulations of employment as apply to employees in the classified service except as to appointment and dismissal. (1939, pp. 68, 876.)" (Emphasis added)

It will be noted that the first sentence of the above quoted section divides positions in the service of the state into three categories, namely, exempt, unclassified and classified. There then follows a detailed specification of what each service shall include, it being stated that "the classified service shall include all other officers and positions in the state service," but the section does not end here, it further provides:

"Except as to services denominated as exempt or unclassified services hereinabove, the governor shall have the power by executive order to extend the provisions of this chapter, to include additional positions or classes of positions."

What is the meaning of the above-quoted provision? Is it for the sole purpose of taking care of new positions that may be created in the future? I think not. Any new position created would necessarily fall within one of the three categories mentioned in the first sentence of Section 301, supra. Furthermore, the above-quoted provision specifically exempts from its operation "services denominated as exempt or unclassified services." In the case of **Heck v. Hall,** 238 Ala. 274, 190 So. 280, the Supereme Court of Alabama, in upholding the constitutionality of the Merit System Act, had the following to say about Section 10 of the original act which was codified in the 1940 Code as Section 301 of Title 55, supra:

"Before concluding this opinion we may further say that Section 10 of the Act is not quite as clear in some of its provisions as might be desired, but we are not called upon here to construe this Act in all of its particulars."

What then is the proper field of operation for this provision? In my opinion this provision was added to give the Governor the power to extend the provisions of the Merit System to any position, except the exempt and unclassified services, that was not covered by the original act. As above stated, the license inspectors were not intended to come within the various provisions relating to the classified services. It is, therefore, my opinion that license inspectors properly fall within that class of positions dealt with in the above-quoted provision.

There having been issued no executive order extending the provisions of the Merit System to license inspectors it follows that license inspectors are not subject ot the provisions of the Merit System.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 11, 1943.

Hon. O. E. Cole, Chairman,

County Commission,

Russell County,

Phenix City, Alabama.

Counties—Meat Inspectors—

1. County has no authority to appoint meat inspector except pursuant to request of Board of Health to enforce health laws.

2. County has no authority to own and operate an abattoir.

3. County may not receive proceeds of fees levied by city without statutory authority.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

This will acknowledge receipt of your request for an official opinion dated May 5, 1943, which is as follows:

"Please render me as Chairman of the County Commission of Russell County, Alabama, an official opinion on the following by the 10th of May, 1943:

"1. Can Russell County participate with the City of Phenix City, Alabama, in payment of salary for a Meat Inspector whose duties will be to inspect meat butchered and offered for sale in the City or County of Russell?

"2. Can the City of Phenix City and the County of Russell jointly control the charges for slaughtering, chilling and storage of green or fresh meats by a privately owned and operated Abattoir?

"3. Has Russell County the power under the law to jointly own and operate an Abattoir?

"4. Can Russell County make an appropriation to the County Health Department for the joint payment between Phenix City and the county for the payment of a salary due a meat Inspector?

"5. Can Russell County jointly with the County Health Department legally receive the fees provided by an Ordinance duly promulgated by Phenix City for inspection of meats, where such Inspector not only inspects meats slaughtered and sold in the city or within the city limits but also in the rural sections of Russell County?"

In answer to your first and fourth inquiries reference is made to Title 12, Section 12, Subsection 19, Code of 1940, defining the authority of a court of county commissioners, which is as follows:

> "To appropriate money to promote or enforce the health and quarantine laws of the state for the benefit of the county and its inhabitants, when requested so to do by the State Board of Health."

By virtue of this provision Russell County is authorized to appropriate funds for the payment of a meat inspector when requested so to do by the State Board of Health. It is my opinion that such an appropriation would be a valid exercise of the power granted to a county for assisting in the enforcement of the health laws of Alabama. Of course, the fact that such appropriation would be jointly used with an appropriation from Phenix City in payment of the salary of a meat inspector would not affect the legality of the appropriation.

However, in the absence of compliance with the above quoted provision, that is, in response to a request of the State Board of Health to assist in the promotion or enforcement of the health laws, Russell County is without authority to provide for the payment of a salary for a meat inspector. It has been consistently held by the courts of Alabama that the courts of county commissioners, or other administrative agencies of a state, are creatures of the legislature, and, before they can perform any act or appropriate public funds, there must be a provision of law expressly or impliedly granting the authority for such act or appropriation. It is my opinion that Russell County is without authority to pay the salary of a meat inspector unless such is done in compliance with the above quoted provision.

The answer to your second question is in the negative. The legislature of Alabama has not seen fit to grant the statutory authority of controlling the charges for slaughtering, chilling and storage of meat to the counties of Alabama. However, by virtue of Title 37, Section 499, Code of 1940, such authority has been granted to the cities and towns of this State. Thus not only has the Legislature failed to grant such power to the counties, but it has provided that only cities and towns may exercise such control. Therefore, it is my opinion that Russell County is without authority to participate in the control of the charges for slaughtering, chilling and storage of meats by a privately owned and operated abattoir.

Your third inquiry is also answered in the negative. I find no legal authority for the ownership and operation of an abattoir by Russell County. Rather, as determined by the case of **Stone v. State ex rel Mobile Broadcasting Corporation,** 223 Ala. 426, 136 So. 727, the judicial construction of Section 94 of the Constitution of 1901, prohibiting the grant of public money in aid of any individual, association, or corporation, is that the aiding or participation in private enterprise by a county comes within the constitutional inhibition. In view of this constitutional provison and in the absence of statutory permission Russell County is without power to entirely or jointly own and opearte an abattoir.

In answer to your fifth question it is my opinion that in the absence of any statutory provision for the same, Russell County is without legal authority to receive the fees levied by an ordinance duly promulgated by Phenix City

for inspection of meats. The receipts and disbursements of a county are directly controlled and provided for by statute, and in the absence of statutory authority Russell County is without power to receive a grant of fees from Phenix City.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 12, 1943.

Hon. Norman W. Harris,

Member, House of Representatives,

Morgan County,

Decatur, Alabama.

Acts—Section 45, Constitution 1901—Statutes Morgan County Court.

1. Act creating Morgan County Court (Act No. 296, S. 434, Local Acts 1931, page 139) held not to violate Section 45 of the Alabama Constitution, 1901.

2. Act of Legislature granting equity jurisdiction to Morgan County Court held constitutional.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

This will acknowledge receipt of your request for official opinion under date of April 15, 1943, which is as follows:

"In 1919 an Act was passed creating the Morgan County Court of Morgan County, Alabama. See Local Acts of 1919, page 194.

"This Act was amended in 1923, in 1927, and in 1931. See Local Acts 1923, page 201; Local Acts 1927, page 219; Local Acts 1931, page 139.

"The amendment of 1931 gave the Court equity jurisdiction.

"A question has been raised in regard to the Constitutionality of the Act of 1931, particularly in so far as the equity jurisdiction of this court is concerned, and particularly in so far as Section 45 of the Constitution is involved.

"We will be grateful for your advice concerning this as soon as possible, since if there is a serious question as to the validity of the Act it is our desire to pass an act removing any question, and this will, of course, require advertisement of notice etc."

Your request presents for consideration the following questions:

1. Is the subject matter of the amendatory Act of 1931 sufficiently germane to and cognant with the title thereof so as to conform with Section 45 of the Constitution of 1901?

2. Was the granting of equity jurisdiction to the Morgan County Court proper?

Your first question is answered in the affirmative. The amendatory Act of 1931 (Local Acts 1931, p. 139) is in compliance with Section 45, Constitution of 1901. This constitutional provision prescribes the manner in which Acts of the Legislature shall be entitled, composed and amended, and reads as follows:

"§ 45. The style of the laws of this state shall be: 'Be it enacted by the legislature of Alabama,' which need not be repeated, but the act shall be divided into sections for convenience, according to substance, and the sections designated merely by figures. Each law shall contain but one subject, which shall be clearly expressed in its title, except general appropriation bills, general revenue bills, and bills adopting a code, digest, or revision of statutes; and no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length."

By judicial construction the foregoing constitutional provision requires that not only shall there be but one subject embodied in an act, which subject shall be clearly expressed in the title thereof, but also that an amendatory act must treat with the same subject matter which is contained in the original act. However, inasmuch as the amendatory act of 1931 bears practically the same title as the original act creating the Morgan County Court (Local Acts of 1919, p. 194) and the intervening amendments thereto (Local Acts of 1923, p. 201, Local Acts of 1927, p. 219) it shall suffice here to determine only if the amendatory act of 1931 contains but one subject properly and clearly expressed in the title of said act.

The amendatory act of 1931 is entitled as follows:

"An Act. To amend an Act entitled: 'An Act to amend an act Entitled an act to amend an act, to establish a County Court for Morgan County; to provide for its officers, their powers, duties and compensation; to provide that said court shall be open at all times for the trial of cases and transaction of business; prescribing rules and procedure of said court; and to provide for the transfer of certain causes now or hereafter pending in the Circuit Court of Morgan County,' Approved August 23, 1927, by repealing Sections 34, 35, 36, 37, 38, 39 and 40 of said Act, and by amending Sections 4, 5, 7, 11, 15, 20, 21 and 23 of said Act, and by adding

to said Act Sections 4½ and 15½:"

Section 11 of said Act of 1931 provides that "All civil cases now or hereafter pending in the Circuit Court of Morgan County, both at law and in equity may, by agreement of the parties thereto be transferred to the said Morgan County Court." Section 23 of said act provides that the said court shall have original and concurrent jurisdiction, of all civil cases both at law and in equity. Other sections refer to rules of practice and procedure to be followed in equity cases. All matters which are germane to, and naturally connected with, the subject announced by the title of an act and not excluded thereby are covered by it and may validly be included in the statute; and for the purpose of determining whether or not a provision is germane to the title a reasonable meaning should be given to the words and context of the provision. 59 Corpus Juris, 812.

The foregoing is the test applied by the Alabama Courts, i. e., is the subject matter germane to and cognate with the subject announced in the title. In the following paragraphs reference is made to a number of Alabama cases in which this test is applied.

The Supreme Court of Alabama in the case of **Summerhill et all v. Tapp,** 52 Ala. 277, held that the title "An Act to establish the city court of Eufaula" necessarily implies the jurisdiction which the court established shall exercise, the parties who can invoke or who are subject to that jurisdiction, and the mode in which the jurisdiction shall be called into exercise. The court stated that "whenever there is a natural and proper relation of the provisions embodied in a statute to the subject expressed in the title, the constitution is not violated."

Jackson v. State, 136 Ala. 96, 33 So. 888, held that a provision giving the recorder original and concurrent jurisdiction of all misdemeanors committed within the city is contemplated by the title "to further define the powers and duties of the recorder of the City of Montgomery," the court stating that the jurisdiction to try such offenses could be properly classed as a power or duty of the recorder.

Again in the case of **Lee v. State,** 144 Ala. 93, 39 So. 366, it was held that the term "jurisdiction" is synonymous with "power" or "authority."

England v. State, 240 Ala. 76, 197 So. 365, held that an act entitled "an act to regulate the trials of misdemeanors in Lawrence County" as amended sufficiently contemplated provisions for the payment of fees to the deputy solicitor. The Court stated as follows:

> "Where subject of a statute is expressed in general terms, everything which is necessary to make a complete enactment in regard to it or which results in a complement of thought contained in the general expression is included in and authorized by it."

In the case of **Dean v. State,** 100 Ala. 102, 14 So. 762, it was held that provisions of an act transferring cases from the circuit court to the county court, the drawing of the jury, terms of the court, and offices of clerk and solicitor, were germane to the title "an act to amend an act entitled an act

to regulate the trial of misdemeanors in Shelby County, approved February 12, 1891."

On the basis of the foregoing cases, it is my opinion that the provisions granting equity jurisdiction to the Morgan County Court are sufficiently contemplated by the terms expressed in the title "to establish county court for Morgan County," "to provide for its officers, their powers, duties and compensation," "prescribing rules and procedure of said court," and "to provide for the transfer of certain causes now or hereafter pending in the Circuit Court of Morgan County."

These terms contemplate the jurisdiction which shall be prescribed for the Morgan County Court; and the provisions granting equity jurisdiction are germane to and cognate with those terms used in the title of the amendatory act.

The second question is also answered in the affirmative. The legislature was acting within its power in granting equity jurisdiction to the Morgan County Court.

In the case of **Polytinsky v. Wilhite,** 211 Ala. 94, 99 So. 843, the Supreme Court of Alabama held that the Acts of 1919 creating a Morgan County Court did not offend Section 105 of the Constitution of 1901, as changing the general law by local law; that the title of the Act was sufficiently comprehensive to include the jurisdiction of the Morgan County Court and the transfer of cases to the said court from the Circuit Court. The case held further that the Act did not change the structure or function of the circuit court but only relieved the circuit court of the burden of trying certain cases. It is my opinion that an amendment to this act granting the Morgan County Court equity jurisdiction would come within the same reasoning as the above cited case.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 12, 1943.

Hon. H. G. Dowling,

Commissioner of Revenue,

State Department of Revenue,

Montgomery, Alabama.

Re: Ad valorem tax on Motor Vehicles—

Opinion by Assistant Attorney General Lapsley.

Dear Sir:

I have your letter of April 22, 1943, in which you request my official opinion as follows:

> "The question has arisen as to whether or not motor vehicles held by dealers are subject to ad valorem tax before the sale of any of such vehicles, and whether the fact that such motor vehicles, because of a restriction on the sale thereof imposed by the Office of Price Administration, are nevertheless subject to ad valorem taxation in the hands of the dealer. Also, a question has arisen as to how such vehicles, if taxable while in the hands of the dealer, should be assessed for ad valorem taxes.
>
> "You are, therefore, requested to advise this Department with respect to these questions."

Motor vehicles are specifically enumerated as subjects of ad valorem taxation under the provisions of Section 21 (e), Title 51, Code of Alabama 1940. Stocks of goods, wares, and merchandise are specifically enumerated as subjects of ad valorem taxation under Section 21 (d), Title 51, Code of Alabama 1940. Section 704, Title 51, Code of Alabama 1940, contain provisions with reference to the assessment and payment of ad valorem taxation on motor vehicles. This Section sets forth an express purpose or intent: "To prevent motor vehicles within the meaning of this article from escaping taxation and to provide for the more efficient assessment and collection of taxes due on same."

In considering these and other applicable statutory provisions, it is necessary to construe these statutes in **pari materia,** in order to give to each provision its separate field of operation.

At the outset, it is obvious that no specific exemption of motor vehicles was intended to be granted by the Legislature, but on the contrary, there is an expressed legislative intent that motor vehicles should not be permitted to escape ad valorem taxation.

The provisions of subdivision (e) of Section 21, Title 51, Code of Alabama 1940, subject a merchant or dealer's entire stock of goods, wares and

merchandise to ad valorem taxation. There appears to be no provision, specifically or by necessary implication, excepting or exempting motor vehicles from being included in the valuation or assessment of such stock of goods, and it is, therefore, my opinion that motor vehicles so long as held by a dealer as a part of his stock in trade should be included in the assessment of his stock of goods. Motor vehicles not constituting a part of a dealer's stock in trade should be assessed for ad valorem taxation in the same manner as motor vehicles purchased and held for use.

The provisions of Section 704, Title 51, Code of Alabama 1940, were first enacted as Section 19 of Act No. 290, approved September 13, 1923 (General Acts of 1923, p. 288, 289, 290). In the original adoption of this section it was expressly provided that such "Section shall not apply to motor vehicles owned by dealers;" also, the original statute, in effect, provided that beginning October 1, 1923, and for subsequent years, motor vehicles should not be included in the regular assessment or return, "but shall be assessed as herein provided," and contained provisions authorizing the State Tax Commission to prescribe a form of assessment or certificate of assessment for use in assessing and certifying the same to the Tax Collector.

Section 19 of the 1923 Act appears as Section 18 of the General Revenue Act of 1927 (General Acts of 1927, pp. 158-160), and also appears as Section 20 in the 1929 Compilation of the Revenue Laws of Alabama, p. 214. Such Section with certain changes was carried into the 1935 Revenue Act (Schedule 158.12, General Acts of 1935, pp. 523, 524). In the 1935 Revenue Act, the provision to the effect that such Section should not apply to motor vehicles owned by dealers, and that motor vehicles should not be included in the regular form of assessment were eliminated, and this Section or Schedule as so modified was codified as Section 704, Title 51, Code of Alabama 1940.

It is my opinion, after considering these several statutes, their legislative history, and the expressed legislative intent, that the provisions of Section 704 are not applicable to motor vehicles so long as the same constitute a part of the stock of goods, wares, and merchandise of the dealer, and only become applicable upon the sale of such motor vehicle, or the bringing of such motor vehicle into the State by an owner or person for any use other than as a part of his stock in trade.

The fact that the sale of motor vehicles constituting a part of the stock of goods is restricted by the Office of Price Administration, or "frozen," does not, in my opinion, relieve such property from ad valorem taxation.

The provision in Section 704 requiring a person applying for a license to operate a vehicle upon the highways to pay the tax upon such vehicle for the "preceding year" was evidently for the purpose of seeing that the tax lien on any separate assessment of the motor vehicle in the preceding year was paid and satisfied. Therefore, if the owner, or a former owner, had separately assessed the motor vehicle for taxation in the preceding year, under the provisions of Section 704, Title 51, of the Code, the tax thereon is required to be paid before the issuance of the license. If such automobile, during the preceding year, was purchased from a dealer and included in the assessment of the stock of goods of such dealer, and was sold out of such stock in the ordinary course of business, there would be no specific tax lien thereon which would be required to be paid before the issuance of the license; and it is my opinion that the Legislature did not intend to place the

burden upon the individual owner or operator of paying the general tax assessment made against the stock of goods of a dealer as a condition for the obtaining by the owner of a license to operate such vehicle.

The opinions of the Attorney General heretofore rendered (Opinions of Attorney General 1936-38, page 698, and Opinions of the Attorney General 1930-32, page 454) in so far as they conflict with this opinion are hereby modified.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 13, 1943.

Hon. J. H. Dobbins, Clerk,

Circuit Court of Calhoun County,

Anniston, Alabama.

Circuit Court Clerks are not entitled to deduct 5% commission from unclaimed witness fees prior to payment to the county treasurer or custodian of county funds pursuant to the provisions of Section 55, Title 11, 1940 Code.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of May 6, 1943, is as follows:

"I would appreciate information on the following question.

"I would like to know if I would be entitled to 5% commission on unclaimed witness fees over two years old when paying same to the County Treasurer.

"Former Clerks in this County have always deducted 5% commission when paying these unclaimed witness fees to the County."

Title 13, Section 198, 1940 Code, reads in pertinent part as follows:

"Duties of clerk.—It is the duty of the clerk of the circuit court: *** 16. To render to the county treasurer, court of county commissioners, or board of revenue, as of December thirty-first and June thirtieth each

year, a statement in writing and under oath, of the fines assessed and forfeitures obtained during the preceding six months, the amount of each, and against whom each was assessed or obtained, **and also what money they have received for the county,** specifying from whom, on what account, and the amount in each case; and, after deducting from such amount five per cent for their compensation, they must pay the balance to whomsoever is custodian of the county funds *** (Emphasis supplied)

Title 11, Section 55, 1940 Code is as follows:

"Report filed with county treasurer.—On the first day of January in each year, all clerks of courts of record within this state shall file with the county treasurer or custodian of county funds a full and complete report of all witness fees collected by them or received by them from their predecessors in office which have not been disbursed to the persons legally entitled thereto, and shall pay into the county treasury all such witness fees which have been collected by them or their predecessors more than two years preceding the making of said report. Said report shall show the amount and date of collection, the name of the witness for whom collected, and the court, style of the cause, and date of its final termination, in which said fee was collected. (1911, p. 200)."

Title 11, Section 1, 1940 Code, is as follows:

"No fee charged unless expressly authorized.—The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law. No provision of this title shall repeal any statute relating to costs or fees, which by its express terms was not intended to apply to all the counties of this state."

At common law costs were not recoverable by either party in any case, either civil or criminal. **Jones v. Tarleton,** 16 Ala. App. 95, 75 So. 643, and while a statute may provide for a fee or compensation, under it an officer claiming fees, must point out a definite law authorizing them, and such law cannot be extended beyond its letter, as the state may impose duties on public officers without providing compensation therefor. **Mobile County v. Williams,** 180 Ala. 639, 61 So. 963; **Jefferson County v. Capanes,** 235 Ala. 449, 179 So. 637; Quarterly Report of Attorney General, Vol. XVI, page 71.

Fees of witnesses for mileage and attendance are taxed as costs and are the property of the witnesses, who may claim such fee from the clerk, the county treasurer or custodian of the county funds, as the case may be, any time within three years from the time such fees are collected, and subject to disbursement. See Title 11, Sections 44 through 55, inclusive, 1940 Code. It appears from the above that witness fees are not collected "for the county" but for the "witnesses" and are held in trust for such witnesses until claimed or until three years have expired, at which time the fees escheat to the county fine and forfeiture fund. In the absence of specific statutory authority, it is my opinion that the clerk is not authorized to deduct five per cent from such remittances.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 13, 1943.

Hon. B. P. Singleton,

Chief Examiner of Accounts,

Capitol.

Code 1940, Title 37, Section 732, fixes a maximum rate of compensation, above which a municipality cannot pay a tax assessor or tax collector for assessing or collecting municipal taxes.

Opinion by Assistiant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of May 6, 1943, is as follows:

"Please refer to General Acts 1931 at page 337 (Section 36), also General Acts 1939 at page 67, and Code of 1940, Title 37, Article 2, Sections 698 through 732, and advise what is the maximum amount of commissions to which a County Tax Assessor and Tax Collector would be entitled for assessing and collecting municipal taxes.

"Does the present law allow a different rate of commissions for the collection of taxes of a municipality falling within a population classification of from 6,500 to 15,000?"

I regret that your inquiry cannot be answered in either the affirmative or negative. The acts to which you refer (1931 Acts 337 and 1939 Acts 67) were adopted prior to the adoption of the 1940 Code of Alabama, and are of a general nature. Where such acts conflict with the provisions of the 1940 Code they are repealed. See 1940 Code, Title 1, Section 9; Title 37, Section 732.

The remuneration to which the tax assessor or tax collector may be entitled for assessing or collecting municipal taxes is fixed by the governing body of such municipality, not by the Code. 1940 Code, Title 37, Section 732, is as follows:

"Commission of tax assessor and tax collector.—The tax assessor and tax collector shall receive such compensation as may be fixed by the governing body of any municipality operating under the provisions of this article not to exceed one-half of one percent for assessing and one-half of one percent for collecting; except in Jefferson County the compensation of the tax collector shall be two-tenths of one percent for collecting taxes, and the compensation of the tax assessor shall be two tenths of one percent for assessing taxes due the city of Birmingham; and three tenths of one percent to both the tax assessor and tax collector for the assessing and collecting of taxes for the city of Bessemer; for the collecting and assessing of taxes for all other municipalities in Jefferson County they shall each be entitled to compensation of one half of one percent, all of said compensation shall be paid by said officers into the county treasury for the benefit of the county."

It is the opinion of this office that the quoted section does not attempt to fix any specific remuneration for these services, but leaves such to the determination of the governing bodies of the various municipalities. However, this section does establish a limit beyond which the municipalities cannot pay for such services. In other words, while the 1940 Code establishes a "ceiling price" for assessing and collecting municipal taxes the governing body of such municipalities may establish a rate of remuneration below that otherwise permitted. The maximum compensation that can be allowed is one-half of one percent for assessing and one-half of one percent for collecting, excepting in Jefferson County where the maximum compensation is as follows:

> "Two-tenths of one percent for assessing and two-tenths of one percent for collecting taxes for the City of Birmingham; three tenths of one percent for assessing and three-tenths of one percent for collecting taxes for the City of Bessemer; one-half of one percent for assessing, and one-half of one percent for collecting taxes for all other municipalities in that county."

This opinion is strictly limited to services rendered during terms of office commencing after June 1, 1941.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 13, 1943.

Hon. John W. Robinson, Sheriff,

Talladega County,

Talladega, Alabama.

Sheriffs—cannot require indemnity bond before executing writ of restitution.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

This will acknowledge receipt of your request for official opinion under date of April 6, 1943, which is as follows:

> "A suit has been filed against Mr. Rutledge, former Sheriff of this County arising out of the execution of a 'Writ of Restitution' in an unlawful detainer case before Hon. Frank Lanier, Judge of the Inferior Court of Talladega, Alabama. The tenant contending that the removal

of his furnishings was unlawful.

"Have I the right, prior to executing like writs, to demand that the owner of the property furnish me with a bond to indemnify me and my deputies against civil suits of like character?"

In my opinion your inquiry must be answered in the negative.

"At common law an officer had no right under any circumstances to demand indemnity for enforcing an execution, but the severity of this rule has been modified and remedied in many jurisdictions by legislative enactment which permit an officer levying an execution to demand indemnity under certain circumstances." 24 Ruling Case Law 972.

By statute a sheriff in Alabama can demand an indemnity bond "when a reasonable doubt exists whether the personal property levied on belongs to the defendant, or whether personal property alleged to be his is subject to levy and sale, *** ." Title 7, Section 533.

Another statute provides that:

"When a doubt exists as to the title of the defendant to personal property which the sheriff is required to levy upon, he may demand indemnity from the plaintiff." Title 7, Section 875.

Obviously the sheriff could not demand indemnity before executing a writ of restitution under either of these statutes since they deal with levy and sale of personal property. I find no statute authorizing the sheriff to require indemnity before executing writs of restitution or similar writs and in the absence of such statute the common law would prevail.

The legislature has provided that under certain circumstances (as shown by Title 7, Section 533, and Title 7, Section 875) the sheriff may require indemnity before making an execution. It has not provided that he may require an indemnity bond before executing a writ of restitution and it is therefore my opinion that if the writ is regular upon its face he must execute it. Title 54, Section 5(1).

In the case of **Duncan v. Johnson, Sheriff,** (1912, Tex. Civ. App.) 146 S. W. 686, the appellant had recovered a judgment in an unlawful detainer action in a justice's court. The sheriff refused to execute a writ of restitution until an indemnity bond was given—the Texas court awarded a writ of mandamus requiring the sheriff to execute the writ of restitution saying:

"We are aware of the fact that the courts of this state have held that an officer might require an indemnity bond in some instances where there has been an express statutory provision therefor, yet an investigation of these cases we think will show that they were those in which the property to be affected by the process was not specifically pointed out in the writ or in cases where there had not been a judgment of court awarding the writ. In this case there was a judgment of a court of competent jurisdiction awarding the right of the possession of the

premises described to appellant as against defendant in the forcible detainer proceeding and also ordering the issuance of a writ, divesting the then possessor of the premises from possession thereof and placing appellant in possession thereof, and, the writ having issued on said judgment and the writ having commanded the officer to enforce the judgment of the court, we fail to see how said officer could under any conditions have subjected himself to any liability for any character of damage arising from the mere execution of the process, and for that reason we are of the opinion that it was the duty of the trial court under the record as made to have awarded the mandamus writ."

The same conclusion is reached in **Tubiola v. Baker** (1929) 225 App. Div. 420, 233 N. Y. S. 373; **Pappe v. Law,** 169 Okla. 15, 35 P. (2d) 941; 95 A. L. R. 943.

It is therefore my opinion that the sheriff cannot require an indemnity bond before executing a writ of restitution.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 17, 1943.

Mr. Riley Green,

Clerk and Register of Circuit Court,

Pike County,

Troy, Alabama.

Costs and Fees—Clerks of Circuit Court—Criminal Appeals—

On appeal in criminal cases from the Circuit Court to the Court of Appeals the clerk is entitled to 15c per 100 words for original transcript and 5c per 100 words per copy to be furnished appellee.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for an official opinion, bearing date of May 10, 1943, is as follows:

"Re: Fees of Clerk of Circuit Court for Preparing Transcripts in **Criminal Appeal Cases**

"In the biennial report for 1928-1930, Attorney General of Alabama, page 727, an opinion directed to the Clerk of the Circuit Court of DeKalb County, Alabama, dated January 10th, 1930, it was ruled that it was the duty of the Clerk of the Circuit Court to furnish the Attorney General of Alabama with a copy of the transcript to the Appellate Court under Section 6102, Code of Alabama, 1923, and it was his duty to make and furnish said copy to the Attorney General of Alabama.

"In the biennial report for 1934-1936, pages 348-349 in an opinion by the Attorney General it was ruled that Section 6102 of the Code of Alabama, 1923 applied to fees in Criminal cases on appeal. At that time Section 6102, Code of Alabama 1923 provided for 10c per 100 words for the original and 5c per 100 words for the copy furnished the appellee (the Attorney General of Alabama), and Section 6108, Code of Alabama, 1923 provided for $2.50 to the Clerk for making an office copy.

"Section 6102, Code of Alabama, 1923 is now Title Seven, Section 768, Code of Alabama, 1940, which provides for a fee to the Clerk of 15c per 100 words for the original and 5c per 100 words for the copy.

"Section 6108, Code of Alabama, 1923, which is now Title Seven Section 771, Code of Alabama, 1940, does not provide any pay to the Clerk for the making of an office copy.

"Since May 31st, 1941, when the Code of Alabama, 1940, went into effect, I have been charging in fee, bills submitted to the Convict Department, 15c per 100 words for the original transcript in criminal cases, where an appeal was taken to an Appellate Court. I have been filing costs bills with the Fine and Forfeiture Fund of Pike County, Alabama, for 5c per 100 words for making the copy which was served on the Attorney General of Alabama.

"My books are now being examined by the State Auditors and they claim that the 5c per 100 words which I collected from the Fine and Forfeiture Fund is not a valid claim; my contention being that it is a valid claim against the Fine and Forfeiture Fund for 5c per 100 words, and a valid claim against the Convict Department for 15c per 100 words for the original transcript under the authority of Title Seven, Section 768, Code of Alabama, 1940.

"I will appreciate your advising me of this matter at your earliest convenience, so that the examination of my books may be completed by the auditors."

It is my opinion that you are correct in your contention that you are entitled to charge 15c per 100 words for the original transcript and 5c per 100 words for the copy to be furnished the appellee in criminal cases that are appealed to the Supreme Court and Court of Appeals. Compare Biennial Report Attorney General, 1936-38, p. 644.

Prior to the adoption of the 1940 Code you were entitled to only 10c per 100 words for the original and 5c per 100 words for the copy to be furnished the appellee. These fees were set out in Section 6102 of the Code of 1923.

It was held by this office that there was no conflict between Section 6102 and Section 3739, as amended, although Section 3739, as amended, provided a fee of 15c per 100 words for making records for the Supreme Court. Biennial Report of the Attorney General, 1934-36, page 347. This opinion was based on the fact that Section 3739 as amended did not set out a separate fee for making the copy and that therefore 5c of the 15c must have been meant for such copy. This opinion is sound, and it is true that two statutes in pari materia should be construed together and effect should be given to the maxim of statutory construction that wherever possible statutes will be construed together and each given a field of operation, and only in the event of an irreconcilable conflict will one statute repeal the other. Alabama Digest, **"Criminal Law"** Key No. 225.

The law was changed, however, by the adoption of the 1940 Code. Section 6102 of the 1923 Code was brought forward into the 1940 Code as Title 7, Section 768, and the fee of 10c per 100 words for the original was changed to 15c per 100 words and the fee of 5c per 100 words for the copy was retained in said section. This clearly shows the legislative intent to increase the fee of the clerks from 10c per 100 words to 15c per 100 words for the original transcript.

Section 3739 of the 1923 Code was brought into the 1940 Code as Title 11, Section 89. This section does not specify a separate fee for making the copy. This section does not, however, purport to set out each fee to which the clerk is entitled, and the omission of said fee from this section does not deprive the clerk such fee if it is specifically provided for elsewhere.

Therefore, the premises considered, you are advised that a fee of 15c per 100 words for the original transcript and 5c per 100 words for the copy to be furnished the appellee on appeal to the Court of Appeals and Supreme Court in criminal cases is a valid charge. As stated in your inquiry, only the 15c per 100 words for the original transcript is payable by the Department of Corrections and Institutions, in view of the specific provision of Code 1940, Title 45, Section 69.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 17, 1943.

Miss Addie Lee Farish, Commissioner,

Department of Commerce,

Montgomery, Alabama.

Banks—Examination—Expenses—

Banks must bear expenses of examination where state superintendent of banks has examined a bank once within the year and has accepted a report of an examination by the federal deposit insurance corporation.

Opinion by Assistant Attorney General Vardaman.

Dear Miss Farish:

Your request for an official opinion, bearing date of April 14, 1943, is as follows:

"Reference is made to Sections 18, 19 and 20, Title 5, of the 1940 Code of Alabama.

"The question has arisen as to liability for expense of examinations. B bank was examined during the current calendar year by examiners of this office without charge to the examined bank. Thereafter, the Federal Deposit Insurance Corporation examined B bank, which examination was accepted by this office, a report thereof having been filed. It now becomes necessary that a further examination be made to ascertain the current condition of B bank.

"Question: Two examinations having been made this year, shall the expense of the current examination be borne by the bank?"

It is my opinion that the question be answered in the affirmative. Section 19, Title 5, of the 1940 Code, provides as follows:

"§ 19. Expenses of special examination.—The expenses incident to any examination more than two within a year shall be borne by the bank so examined, and such bank so examined shall, on the call of the superintendent of banks, pay into the treasury of Alabama, within ten days after said examination, not exceeding twenty-five dollars for each day a bank examiner or the superintendent of banks is engaged in making such examination. There shall **be no charge for the two regular annual examinations of banks as required in the preceding section.** (1911, p. 50; 1923, p. 716.)"

It will be noted from the underlined portion of the above quoted section that no charge should be made for the two regular examinations required by Section 18 of Title 5. Section 18 provides in part as follows:

" *** provided however, that only one such annual examination shall be required of such banking institutions, deposits in which are insured by the federal deposit insurance corporation or its successor, if any."

It is apparent from the above quoted portion of Section 18 that it was the legislative intent to accept the report of the federal deposit insurance corporation in lieu of one of the annual reports required by Section 18. This contention is further borne out by the first sentence of Section 20, which provides as follows:

"The state superintendent of banks is authorized to accept in his discretion in lieu of any examination authorized by the laws of this state to be conducted by his department of a banking institution the examination that may have been made of same within a reasonable period by the federal deposit insurance corporation provided a copy of said examination is furnished to said state superintendent of banks."

The premises considered, it is my opinion that the legislature intended for all banks to be examined twice annually, but they intended for the examination made by the federal deposit insurance corporation to count as one of these examinations. If, therefore, a bank has been examined by the state bank examiners and by the federal deposit insurance corporation and your office has accepted a copy of that examination in lieu of your second annual examination and it is now necessary that the bank be again examined, it is my opinion that such bank will be liable for the expense of such examination.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 17, 1943.

Hon. William W. Hill,

Judge of Probate,

Montgomery County,

Montgomery, Alabama.

Code 1940, Title 62, Section 568—City of Montgomery—Commissioner's Bond—Approval, Filing, and Recording—Code 1940, Title 41, Section 46.

The official bond required to be executed by each Commissioner under Code 1940, Title 62, Section 568, should be approved, filed and recorded by the Judge of Probate as required by Code 1940, Title 41, Section 46.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of May 12, 1943, is as follows:

"In Re: Title 62, Section 568.

"Should the bond of each of the City Commissioners, after being approved by the Judge of Probate, be recorded and retained by the Judge of Probate, or should it be approved by the Judge of Probate, recorded and returned to the City Commission, or should the bond only be approved by the Judge of Probate and returned to the City Commission?"

Commission government for Alabama cities was launched in 1911 by four acts of the Legislature. General Acts 1911, pages 204, 289, 330, 591. At that time, as now, official bonds required by law to be filed by any public officer had to be by such officer "recorded word for word in a well bound book and properly indexed." Code 1907, Section 1497; Code 1940, Title 41, Section 46.

In the first of these acts, applicable only to the city of Birmingham, no provision is made for execution of a bond by the commissioners; but in the other three acts such provision is expressly made and in two of them the requirement is that each commissioner "shall also give bond in the sum of five thousand dollars payable to said city conditioned upon the faithful performance of his duties as such commissioner, which bond shall be approved by the judge of probate of the county in which said city is located and recorded in his office, for which the judge of probate shall receive one dollar to be paid by the commissioner." General Acts 1911, page 344, Section 13; page 602, Section 13.

In the other act the requirement as to official bond is thus expressed:

" *** Each commissioner shall before entering upon the duties of this office, give a good and sufficient surety bond, which may be executed by a bonding company, authorized to do business in Alabama, payable to and for the use and benefit of any such city, in the sum of five thousand dollars conditioned for the faithful discharge of his duties, and that he will save such city harmless from all loss caused by his neglect of duty or misfeasance in office or for the wilful expenditure of any moneys of such city in violation of law and said bond before being accepted, shall be approved by the probate judge in and for the county wherein such city is situated, the premiums on said bond shall be paid out of the city treasury." General Acts 1911, pages 289, 304, Section 12.

No valid reason is perceived for the variation in the language of the three acts with reference to these bonds. It will be noted that in two of them the bond is expressly required to be recorded in the office of the judge of probate whereas in the other act there is no such requirement, although in all three acts the bond must be approved by the judge of probate.

In view of the fact that the provision as to bonds was evidently required for the protection of the public, and also of the fact that all official bonds, as above noted, were required to be recorded and indexed in the office where they were filed, I am of opinion that in each instance it was the legislative intent that the bond be not only approved by the judge of probate but that it also must be filed and recorded in his office. I can see no ground for distinction in this regard as between the three different acts, each of them based on classification according to population.

In 1931 the Legislature passed an act evidently for the benefit of the city of Montgomery (General Acts 1931, page 99). This act was revised and reenacted in 1939 without change, however, as to the requirement of bonds to be executed by the commissioners. The acts of 1931 and 1939 adopted the language last above quoted from the Act of April 6, 1911, with reference to execution of official bonds by the commissioners and it will be seen there is no express provision for recording these bonds. This same statutory provision as to execution of bonds by commissioners of the city of Montgomery now appears as Code 1940, Title 62, Section 568 in the same language as that found in the acts of 1911 and 1931, supra.

By reason of this legislative history, to which resort may be had for interpreting indefinite statutory provisions, and on account of the continuing requirement for record and filing of official bonds which has appeared from time to time in all the codes for many years, I am of opinion that bonds to be executed by the commissioners of the city of Montgomery should not only be approved by the judge of probate but should be filed and recorded in his office to the same extent and in the same manner as all other official bonds required by law to be filed and recorded therein.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 18, 1943.

Hon. Edward McGregor, Chairman,

Madison County Board of Commissioners,

Huntsville, Alabama.

Counties—Board of County Commissioners—

The expenses of Members of the Board of County Commissioners of Madison County, Alabama incurred in attending a convention of the National Association of County Officials cannot be paid out of the general fund of the county.

Opinion by Assistant Attorney General Arbuthnot.

Dear Sir:

Your request for official opinion bearing date of April 30, 1943, is as follows:

"The National Association of County Officials will hold its annual convention in Omaha, Nebraska, on May 24, 25, and 26, 1943, and Members of the Board of Commissioners for Madison County have received an invitation to attend this meeting.

"The National Association of County Officials is organized to combat centralization in Government and to encourage greater efficiency in County Administration.

"Can the expense incurred by the Members of the Board of Commissioners of Madison County in attending this Convention be legally paid from the General Fund of the County?"

It is my opinion that the answer to your inquiry must be in the negative.

This office held in an opinion rendered to Hon. Charles W. Lee, State Comptroller, under date of May 3, 1935, and found in Opinions of the Attorney General, Office Edition, Vol. 4-A, page 23, that there was "no authority of law, either expressed or implied whereby the county may pay the expenses of the Judges of Probate or Members of the Courts of County Commissioners for attending meetings of their respective associations." As stated in this opinion:

"Public funds cannot be expended unless there is express authority or authority necessarily implied. Before a Court of County Commissioners, Board of Revenue, or other like county governing body can pay any claims or do any act, it must be able to point to some direct statute or it must be authorized by necessary implication to do the act or perform the service.—**Bice, County Treasurer, vs. Foshee,** 19 Ala. App. 421, 97 So. 764; **Ensley Motor Co. vs. O'Rear,** 196 Ala. 481, 71 So. 704."

In an opinion rendered by this office to Hon. J. W. Heustess, Clerk, Board of Revenue, Montgomery County under date of May 10, 1935, Biennial Report of Attorney General 1934-36, page 160, it was held that by appropriate resolution of the Court of County Commissioners, the necessary expenses of its members incurred in attending a meeting of the Association of County Commissioners of Alabama, could be paid out of the Road and Bridge Fund of the County, where the purpose of the meeting was to promote the construction and maintenance of public roads and bridges by means of educational lectures, exhibits, and demonstrations at such meeting. This opinion was based on an opinion rendered by this office to the Clerk of the Board of Revenue of Montgomery County under date of June 25, 1930, which reads in part as follows:

> "Section 1347, Code of Alabama, 1923, provides that the board of revenue or court of county commissioners has the power and authority to do all things needful and necessary in and about the construction and maintenance of public roads. By said Act the several county boards are vested with general superintendence of the public roads, bridges and ferries within their respective counties, and may establish new, and change and discontinue old roads, bridges and ferries so as to render travel over same as safe and convenient as practicable. To this end said Boards are given 'legislative, judicial, and executive powers' except as is limited in the Act, and for the purposes named in the Act have 'unlimited jurisdiction and powers.' They have the power and authority to pay all expenses necessary to obtaining information that may serve to better qualify said Boards to intelligently study said road matters."

Following the reasoning set out in the above opinion it was held in an opinion rendered to Hon. T. C. Garner, Treasurer, Jefferson County, under date of July 9, 1940, Quarterly Report of Attorney General, Vol. XX, page 37, that payment of dues in the Association of County Commissioners of Alabama was authorized upon adoption of appropriate resolution to that end by the county governing body.

However, in the instant case, I can find no authority, express or implied, under which expenses of the Members of the Board of County Commissioners incurred in attending a convention of the National Association of County Officials may be paid out of the general fund of the county.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 18, 1943.

Hon. G. A. Mosley,

Sheriff, Montgomery County,

Montgomery, Alabama.

Where there is a judgment against the defendant and execution is returned "no property found" the clerk may then issue execution against the plaintiff for the costs accruing at his instance but, in no case, can this happen until the execution has been returned as stated above.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion bearing date of May 13, 1943, is as follows:

"Re: Court Cost.

"Will you be kind enough to advise me whether or not I am permitted to collect court cost from a Plaintiff in Judgment Execution where there is a 'no property found' against the defendant, before returning said execution back to the court, to that effect.

"The auditors inspecting our records the past year stated that in all judgment executions where there was 'no property found' against the defendant, not to collect court costs from the plaintiff, but return execution and the court would issue execution against the plaintiff for the cost, with an added $1.50 which is allowed sheriff for collecting cost from the plaintiff."

Under the law you cannot collect from the plaintiff in execution the costs which accrued at his instance until there has been an execution issued against the defendant in execution and returned "no property found." In this connection, I call your attention to Title 11, Section 7, Code 1940, where it says:

"§ 7. When execution against plaintiff for his own costs; penalty for failure to collect, etc.—The clerk of the supreme court, court of appeals, clerks of the circuit court, judges of probate, and justices of the peace, and registers, upon return of an execution 'no property' against the defendant by the proper officer of the county in which the judgment was rendered, or, if the execution be from the supreme court, court of appeals, of the county from which the case was brought, may issue execution against the plaintiff, or against the plaintiff and sureties, or appellant and sureties as the case may be, for the costs actually created by the plaintiff, or appellant *** ."

It can be seen from the above that the clerk is without authority of law to issue execution against the plaintiff for the costs which have accrued at his

instance until execution against the defendant is returned "no property found."

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 20, 1943.

Hon. Frank R. Broadway, Director,

Department of Industrial Relations,

Montgomery, Alabama.

Unemployment Compensation Law—Code 1940, Title 26, §§ 180-252—Code 1940, Title 5, § 137—Banks and Banking—

State banks not exempt from operation of the Unemployment Compensation Law.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of May 14, 1943, is as follows:

"I wish to ask your opinion as to whether banks organized under the Constitution and laws of the State of Alabama, and what are commonly known as 'state banks' are liable for the payment of state unemployment compensation taxes, assuming they have the required number of employees in a calendar year to make an employer subject for contribution purposes under the Unemployment Compensation Law of this state.

"In considering this question I wish to call your attention to Paragraph 7, Section 186, Title 26 of the 1940 Code of Alabama, which excludes from the definition of 'employment' under the Unemployment Compensation Law:

" 'Services performed in the employ of a state or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is **wholly** owned by one or more states or political subdivisions; and any service performed in the employ of any instrumentality of one or more states or political subdivisions to the extent that the instrumentality is, with respect to such service, immune under the Constitution of the United States from the tax imposed by Section 1600 of the Federal Internal Revenue Code.' (Underscoring supplied)

"I would also like to call your attention to Section 137, Title 5, of the 1940 Code of Alabama which provides as follows:

> "'All banks incorporated under the laws of Alabama are hereby declared to be instrumentalities of the state. As such they are hereby required, in addition to all other duties now required of them, to perform for the state, and its subdivisions without charge the following services: The handling and collection (or credit at the option of such bank) of all warrants issued by the State of Alabama, or by any county or other political subdivision thereof; the handling and collection (or credit at the option of such bank) of all bonds and interest coupons thereto issued by the State of Alabama or any county or other political subdivision thereof; serve as paying agent for the State of Alabama when so requested by the treasurer.
>
> "'It is the intent of this section to relieve state banks from any duty, obligation, responsibility or liability imposed upon them by what is known as the unemployment insurance feature of the social security act, state and federal, but nothing herein shall be construed to relieve such banks from any duty, responsibility, liability or obligation imposed upon them under any other state law now existing or that may be hereafter enacted. (1936-37, Ex. Sess., p. 150.)'"

The question is whether Code 1940, Title 5, § 137 suffices to exempt state banks from operation of the Unemployment Compensation Law (Code 1940, Title 26, §§ 180-252).

Title 5, § 137 originated in Act No. 134, S. 59, approved Feb. 23, 1937, (General Acts 1936-37, Ex. Sess. 150) and is a substantial copy of that act. Expressly and specifically it purports to exempt state banks from the Unemployment Compensation Law, referred to as "the unemployment insurance feature of the social security act, state and federal," by declaring State banks to be "instrumentalities of the State."

As such, State banks fell within the exemption of the State's original Unemployment Compensation Law (Act No. 447, S. 395, approved Sept. 14, 1935, Gen. Acts 1935, p. 950) in Section 2(6) whereof it was stated that "the term 'employment' shall not apply to *** service performed in the employ of a state, or political subdivision thereof, or an **instrumentality** or one or more states or political subdivisions." Obviously, therefore, the Act of February 23, 1937, supra, was designed to bring state banks within the exemption of State instrumentalities theretofore declared in the Act of 1935, § 2(6) supra.

The Unemployment Compensation Law was revamped, revised and rewritten, however, in 1939 under guise of an amendment to Act No. 447, supra. Of the twenty sections of the original act only two were left untouched by the amendment, viz., Section 1 designating a short title, and Section 11, accepting the benefits of federal legislation known as the Wagner-Peyser Act of June 6, 1933 (48 Stat. 113), whereby the State agreed to "observe and comply with said Act of Congress."

In said revision the exemption theretofore attaching to state instrumentalities was narrowed to embrace only such as were "wholly owned by one or

more states or political subdivisions'" (Acts 1939, pp. 721, 725, § I IV, 7). Manifestly state banks could no longer qualify for exemption as state instrumentalities, because they were "not wholly owned," nor owned to any extent whatever, by the State.

Aside from this manifest conflict between the revised act and the bankers' act of Feb. 23, 1937, in the matter of exemption, the revised act (Section 17, page 754) purports expressly to repeal all conflicting law.

Notwithstanding the foregoing legislative history the Act of February 23, 1937, was imported into the Code of 1940 as Section 137 of Title 5, in Chapter 3, under the caption of "Miscellaneous Provisions as to Banks and Banking."

There can be no question, apparently, that pretermitting consideration of said Title 5, Section 137, State banks are within the purview of the unemployment compensation law as now written and codified, and that they can no longer claim to be exempt therefrom on the footing of State instrumentalities under Title 26, Section 186, D(7).

The problem is therefore to resolve the conflict between two irreconcilable provisions of codified statutory law as best we may.

In 59 C. J. on page 893, Statutes, § 490, it is said that "the acts of revisers in continuing to include a statute which had been repealed in subsequent revisions of the statutes does not operate to keep it in force" and the case of **State v. Noble,** (Mo.) 187 S. W. 896, 203 S. W. 956 is cited as authority. On the same page (§492) it is said: "It has been stated broadly that a compiler is not a lawmaker, that codification is not legislation, and that a statute neither gains nor loses force by the place it occupies in the collection of laws. Its sanction, it was said, depends on its own terms, and would be the same if it had been provided anywhere else in a code." **Paulson v. Hurlburt,** 183 P. 937, 93 Or. 419.

In 25 **R. C. L.** 925, § 175, it is said: "It has been held that where two inconsistent statutes are carried into the codified law, the one last passed, which is the latter declaration of the legislative will, should prevail." See **Adkins v. Arnold,** 235 U. S. 417, 35 S. Ct. 118, 59 U. S. (L. ed.) 294; **Hillsborough County v. Jackson,** 58 Fla. 210, 50 So. 423; 25 **R. C. L.** 925, Statutes, § 175, Note 16.

The foregoing rule of construction is followed by our own court of last resort. Where there is conflict, repugnancy or inconsistency between two provisions of law as they appear in the Code, the court will look to their history and origin and give effect to that provision which was last enacted by the legislature, as being the last expression of its will and intent. The later enactment will prevail over the earlier one in so far as the earlier act is in conflict with or inconsistent with the later enactment. **Steele v. State,** 61 Ala. 213; **Gunter v. State,** 83 Ala. 96, 3 So. 600; **Zaner v. State,** 90 Ala. 651, 8 So. 698; **Calhoun County v. Watson,** 152 Ala. 554, 44 So. 702.

I am of opinion, therefore, that State banks are subject to the operation of the Unemployment Compensation Law. The act of February 23, 1937, purporting to take them out of its operation was superseded and impliedly at

least, if not expressly, repealed by the revision of that law in 1939. The fact that both acts were incorporated in the Code of 1940 will not operate to nullify the repeal; or to restore vitality to the Act of 1937, or its progeny, Title 5, Section 137. The latter was "still-born."

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 28, 1943.

Hon. G. Claiborne Blanton,

Judge of Probate, Dallas County,

Selma, Alabama.

Probate Judge not entitled to 25 cent fee for furnishing new owner with carbon copy of certificate to the effect that application for transfer of license of motor vehicle has been filed.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of May 19, 1943, is as follows:

"Reference is made to opinion rendered to Hon. Maynard L. Malone, Judge of Probate, Morgan County, Decatur, Alabama, under date of June 17, 1937, and published in Biennial Report, Attorney General, 1936-1938 on Page 271, in which it is held that Probate Judge is not entitled to a fee for noting the change of ownership of automobile tags.

"In addition to noting the change on the record we are furnished by the State with attached forms in triplicate, which, as you will note, is a certificate. It seems to me that under Title 11, Section 29, the Probate Judge is entitled to a 25c fee for each certificate without seal of office.

"I understand that fee is not allowed for noting the change of ownership on the license record, but I am not sure about issuing the certififcate. I would therefore appreciate your rendering me an opinion, answering the question whether or not the Probate Judge is entitled to a fee of 25c for issuing the attached certificate to the new owner."

The forms attached to your letter consists of two white and one yellow blanks, and worded as follows:

"TRANSFER OF MOTOR VEHICLE LICENSE

STATE OF ALABAMA. _____ COUNTY

This is to Certify that proper application having been made to me, by

_____

Address _____
I have this day transferred License No. _____
Motor No. _____ Kind of Vehicle _____
From _____ (Original Owner) to
Name _____
Address _____
Repossessed: Yes _____ No _____
Given under my hand this _____ day of _____ 194____.

_____

Probate Judge."

The forms are furnished the Probate Judge by the State Department of Revenue to facilitate his work, the intended use being that the first copy will be an original and the other two carbon copies. In addition to the above writing the forms include the following:

(Original) "Copy for State Department of Revenue"

(First carbon copy) "Copy for Transferee"

(Second carbon copy) "Copy for Probate Judge."

Clearly under the intended use of such forms the transferee does not receive the original copy of such but a carbon copy, the same as you retain for your records. Assuming that you give the new owner or transferee the carbon copy, in my opinion you are not entitled to charge for same. Our courts have held that aside from certain police features, the license tax levied on motor vehicles contemplates that the owner pay for the use of the highways. **Williams v. Albany,** 216 Ala. 408, 113 So. 257. Also, the pertinent portion of Title 51, Section 706, of the 1940 Code is as follows:

"§ 706. *** (a) When proper motor vehicle license tags shall have been bought for the current tax year for a motor vehicle and such motor vehicle shall have been sold or transferred to a new owner or new owners, either once or successively, such motor vehicle license tags shall remain on such motor vehicle in the hands of the new owner or successive owners for the balance of the tax year, and no new or other license tags need be taken out for the operation of such motor vehicle until the beginning of the next tax year. Provided, each and every change of ownership of such automobile, or other motor vehicle, and the name and address of the new or successive owner are noted by the probate judge on his record of the license and reported by him within ten days after such change in ownership is reported to him to the department of revenue, and it shall be the duty of the old and new and successive owners to report such change in ownership to the probate judge within five days from such change in ownership. *** Any person failing to perform the duty re-

quired of him by the provisions of this section shall be guilty of a misdemeanor, *** ."

From the above it definitely appears that once the license fee has been paid the automobile or other motor vehicle may be operated on the highways of this state for the remainder of the tax year, regardless of who may own same. The situation is somewhat analogous to where one person owns an automobile, for which he has procured the necessary license, and such automobile is being operated by a member of his family, obviously there is no necessity for the member of the owner's family to procure a transfer of the license, nor is it necessary for a new or successive owner to procure a transfer of the license. The cited code section is penal in nature, and though failure to comply with its provisions may subject a person to criminal prosecution, nevertheless it is not necessary for the new or successive owner of a motor vehicle to apply for a transfer of the automobile license. (See Rep. Att'y Gen. Biennial Rep., 1936-1938, page 257) No transfer of the license being required it necessarily follows that the new or successive owner cannot be required to apply for such or procure a certificate to the effect that he has so applied. However, the cited code section does not provide that you must furnish such new or successive owner with evidence that he has complied with its provisions, and should such person desire a certificate that you have been notified of the change of ownership, you may issue a certificate to such effect and collect the usual statutory fee.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 28, 1943.

Hon. J. W. Hamilton,

Tax Collector,

Jefferson County,

Birmingham, Alabama.

Code 1940, Tit. 51, § 110—Taxation—Appeal from Increased Assessment—Tax Sales—

1. Where taxpayer appealed from increased valuation of property for 1941, but failed to appeal from increased valuation for 1942, property may be sold for unpaid taxes for 1942, pending appeal.

2. If Circuit Court sustains any increase in valuation, it must also render judgment against taxpayer and sureties on his appeal bond for taxes due by reason of the increase in valuation and order the tax collector to collect the taxes due thereby.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of April 19, 1943, is as follows:

> "For the tax year 1940, W. E. Willett assessed Lot 1 Block 19 Birmingham Realty Company's First Addition at an assessed valuation of $6,000.00. For the tax year 1941 the Board of Equalization raised the assessed value on said property to $6,600.00.
>
> "Mr. Willett appealed to the Circuit Court and filed a Cost Bond and, on December 3, 1941, paid on the preceding year's value. This left the amount of raise namely $600.00, or $21.60 in taxes, in litigation pending adjudication of the case in Circuit Court. For the tax year of 1942 said property was assessed at $6,600.00 and no appeal was taken on this valuation as fixed by the Board of Equalization.
>
> "Shall I sell said property for 1942 tax before the appeal filed on 1941 tax is finally adjudicated? If your opinion is in the affirmative and the State buys in the property at the sale for 1942 taxes, how then shall I enforce the collection of the balance due on 1941 taxes if and when the Court fixes a value more than the assessed value for 1940?"

With reference to appeals to the Circuit Court from valuations fixed by the Board of Equalization the statute expressly provides:

> " *** In the event the judgment of the court shall fix an assessment greater than that upon which the taxes have been paid the taxes on the assessment appealed from; the court shall fix and determine the amount of such excess and the taxpayer and the sureties on his appeal bond shall be adjudged to pay taxes due by reason of such increased assessment with interest from the date of judgment and the lien and priorities of the state and counties or other agencies shall apply to such additional amount as in other cases. The court in fixing the assessment shall order the assessing authorities to apportion the same and the collecting authorities to collect taxes thereon for the several taxing subdivisions in the manner provided by law." (Code 1940, Title 51, § 110).

If, therefore, the Circuit Court, in the appeal by the taxpayer now pending from the assessment of 1941 taxes, should fix a value in excess of assessed value for 1940, the above-quoted provision of law affords the appropriate remedy for collection of taxes on such excess value.

The remaining question is whether pending said appeal you are authorized to sell the property to satisfy 1942 taxes. The statute itself (§ 110, supra) answers the question as follows: "The Circuit Court *** shall have no power to enjoin or suspend the collection of any taxes due."

By failing to appeal from valuations fixed for 1942 taxes the taxpayer has in effect suffered a judgment to be rendered against him for those taxes based on the increased valuation of $6,600 for 1942. The judgment of the

Board of Equalization has become final and is sufficient to support a sale. In the exercise of its powers it was "equivalent to a court of limited jurisdiction." **Penny v. State**, 229 Ala. 36, 38 (3, 4).

The present situation is to be distinguished from that considered by this office in its opinion addressed to you under date of October 20, 1942, (Quarterly Report, Attorney General, Vol. XXIX, page 31), where the taxpayer appealed from each assessment for two successive years and it was held that in each instance the valuation for the year next prior to appeal should be adopted as the basis for collecting taxes pending final disposition of the appeals.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 31, 1943.

Hon. R. M. Bannister,

Clerk of the Circuit Court,

Blount County,

Oneonta, Alabama.

The Clerk of the Circuit Court or other inferior court from whose judgments there is a direct appeal to the Court of Appeals or Supreme Court is entitled to a $2 fee for making the records in probation cases which have reached such courts on proper petition from inferior courts from whose judgments there is no appeal directly to the Court of Appeals or Supreme Court, but in no other probation cases.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request bearing date of May 11, 1943, is as follows:

"I have been recently informed that the State will pay the Clerk's fee of $2.00 in Probation cases for keeping orders of probation where the cost is taxed to the State.

"If this is true wish you would please give me the opinion as I am unable to find it."

I am unable to find any opinion of this office dealing with this phase of cost in probation matters and am just a little uncertain as to what fees or

costs you refer to. However, I am presuming you are referring to provisions of Title 11, Section 90, and Title 42, Section 20, Code of Alabama, 1940.

Title 11, Section 90, is as follows:

"§ 90. Clerks fees in probation cases.—The clerks shall be allowed a fee of two dollars for all of his services in probation cases certified from an inferior court to the circuit court or other court from which an appeal lies directly to the court of appeals or supreme court, which if not paid by the probationer shall be payable out of the funds of the department of corrections and institutions as other such court costs are now paid."

The pertinent parts of Title 42, Section 20, are as follows:

"The clerk shall be allowed a fee of two dollars for all of his services in probation cases certified to the circuit court or inferior court from which an appeal lies directly to the court of appeals or supreme court, which if not paid by the probationer shall be payable out of the funds of the state department of corrections and institutions as other such court costs are now paid."

These sections give the clerk of the circuit court or the clerk of any inferior court from whose judgments appeal lies directly to the Court of Appeals or the Supreme Court a fee of $2 for his services rendered in probation cases where such cases reached the circuit court or other inferior court from whose judgments appeal lies directly to the Court of Appeals or Supreme Court on proper petition filed by the defendant and in no other cases. In other words, if the criminal case originated and is tried in the circuit court or any other inferior court from which judgment appeal lies directly to the Court of Appeals or Supreme Court and such court grants probation to the defendant you would not be entitled to the $2 fee. When such fee is not taxed against and paid by the probationer such fee must be paid by the State Department of Corrections and Institutions as other such costs are now paid.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

May 31, 1943.

Hon. G. W. Robertson,

Judge of Probate, Baldwin County,

Bay Minette, Alabama.

County Land Agents—Compensation for Services—Code 1923, Sections 3135-3137—General Acts, 1932, Extra Session, page 99—

Under a contract between the State Tax Commission and a county land agent, pursuant to Code 1923, Sections 3135-3137, as amended by Acts 1932, Extra Session, page 99, the land agent should present to the county governing body his claim for services payable out of money received by the county by reason of such services and upon disallowance thereof, he may maintain an action for compensation against the county itself.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your letter of May 21, 1943, requesting an official opinion is as follows:

"On July 15, 1940, I received from the State Comptroller funds in the amount of $1091.39, which was the County's part in the sale of certain lands under a decree in Equity Court in case No. 506—Long vs. Mitchell. At that time Senator W. C. Holmes was land agent and he made a demand on me for his commissions on this sale under a contract under which he operated at the time litigation was instigated for the sale of these particular lands. He requested that I request an opinion from the Attorney General and that he would settle in accordance with his opinion rendered. About that time I made this written request but have never had an opinion.

"Senator Holmes is now in the army and the State Examiners are here and I am very anxious to get this matter disposed of while they are still here. If it is possible will you please give me this opinion at your earliest convenience so that proper distribution of these funds can be made by the time the Examiners finish this examination."

Under date of May 27, you also submitted copy of an agreement dated February 7, 1935, between the State Tax Commission and Dr. W. C. Holmes, designating him as State Land Agent for the County of Baldwin, pursuant to Code 1923, Sections 3135-3137 and Act No. 104 S. 88, approved October 19, 1932 (General Acts 1932, Extra Session, page 99), with compensation of "ten per cent of the proceeds arising from any sales or redemption which may take place after efforts of the party of the second part have been made to bring about such sales or redemptions," not to exceed $5,000 in any calendar year.

Code 1923, Sections 3135-3137 authorize employment of such land agents

in each county of this State "to investigate sales of real estate for taxes and bid in for the State, to notify parties at interest in such real estate, of such sale, and to secure redemption or sale of property subject to sale at private sale by the State." For such services the State Auditor, under Section 3137, "may allow fair compensation, which shall not exceed ten per cent of the proceeds of such rent, sale, or redemption, and shall be paid from the funds so received."

By Act No. 104, supra, the functions and duties of the State Auditor were assigned and transferred to the State Tax Commission with reference to appointment and compensation of land agents.

The statute provides, as will be seen, for payment of compensation from the funds received upon sale or redemption, but is silent as to the manner, mode, time, or place of payment. A natural inference would be that payment should be made through the State Tax Commission, now the Department of Revenue, inasmuch as the Commission was a party to the alleged contract.

In **Lewis v. City of Birmingham,** 203 Ala. 217, 82 So. 467, it was held, however, that an action would lie against the City of Birmingham for recovery under the common counts of compensation earned by the Land Agent under a contract similar to that here involved. In that case the land agent had been designated and his compensation provided for pursuant to Code 1907, Sections 2333-2336, and under Section 2336 compensation was payable from the funds received upon sale or redemption, but there, as here, no express provision was made as to the manner, mode, time or place of payment.

In that case also it appeared that the land agent had prior to bringing suit presented his claim for payment to the City of Birmingham and that it had been disallowed, so that his only recourse was to sue for recovery.

I am of opinion, therefore, that Dr. Holmes should present his claim for compensation to the governing body of Baldwin County for audit and approval, and that if it should be disallowed, he may then vindicate his rights by an action at law against the county. I find no authority whereby you, as Probate Judge, without approval of the claim by the county governing body, are authorized of your own motion to pass upon and pay the claim.

For your information the Code sections of the 1923 Code cited in this opinion were not brought forward in the 1940 Code. However, this fact would not affect the legal question here presented, as the contract with Dr. Holmes was made and entered into under the provision of the 1923 Code.

I am returning herewith copy of the contract.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 2, 1943.

Hon. S. W. Smyer,

Member, House of Representatives,

Birmingham, Alabama.

Code 1940, Tit. 51, §§ 630-631—Lubricating Oils—Summer Black Oil—

Summer black oil, if sold for use and actually used as an ingredient in the manufacture of shells for the army is not subject to the excise tax imposed by Code 1940, Tit. 51, § 631 upon lubricating oils or substitutes therefor.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of May 29, 1943, is as follows:

"One of my constituents is the Dixie Chemical Products Company, Ltd., of Birmingham. This Company manufactures a product known as 'Nosing compound,' which is used in the production of shells for the U. S. Army. Among the firms in this area who use this compound for this purpose are Stockham Pipe Company, T. C. I. & R. R. Company, Rheom Manufacturing Company and others.

"One of the ingredients of this 'nosing Compound' is summer black oil, which this firm buys from Wofford Oil Company. Summer black oil can be used for lubricating purposes, and when so used, is subject to the tax imposed by the State of Alabama of 2c per gallon. Code of 1940, Title 51, Section 631. Use of this oil in such 'nosing compound,' however, is not a lubricating purpose. The U. S. Government recognizes this fact, in that it levies a lubricating oil tax of 6c per gallon, but is waiving collection thereof upon an affidavit of the purpose for which the oil is being used.

"The State of Alabama has accepted similar affidavits in connection with other types of oil, when used in floor dressing, roofing paper, etc.; but the State gasoline tax department has refused to accept such affidavit in lieu of tax on this summer black oil. The gasoline tax department basis its refusal on an alleged attorney general's opinion of more than fifteen years ago, a copy of which cannot be found either by that department or by your office.

"Accordingly, your opinion is requested as to the propriety of the gasoline tax department waiving collection of this tax upon receipt of the same affidavit under which the Federal Government waives same."

The question as I understand it is whether upon reading Sections 630 and

631 of Title 51, Code of 1940, together and construction thereof in pari materia, the excise tax thereby imposed upon lubricating oil, or substitutes therefor, is imposed upon a product called "summer black oil" when used, not as a lubricating oil, but as an ingredient in the course of manufacture of shells for the army.

In my opinion, based upon consideration of the two sections in their entirety, the legislative intent was to tax such substances, oils, or substitutes, only when used for the purpose of lubricating "engines, bearings, journals, axles, hubs and other parts of machinery." Code 1940, Tit. 51, § 630. This upon the well-known principle of construction that taxing statutes, when ambiguous in their terms, must be construed most favorably to the taxpayer. **State v. Coastal Petroleum Corporation,** 240 Ala. 254, 198 So. 610.

It is conceivable that castor oil might possibly be used to lubricate machinery and when so used no doubt it would be within the purview of Sections 630-631, supra, and subject to the tax thereby imposed. It would seem equally clear, however, that castor oil when used for other purposes, and for the purposes for which it is ordinarily and customarily used, does not come within the taxing statutes.

I am of opinion therefore that upon proof satisfactory to itself that in some particular instance summer black oil has neither been sold for use nor used for lubricating purposes, the Department of Revenue should not undertake to impose upon such sale the tax levied under Code 1940, Tit. 51, § 631.

Whatever prior opinion of this office there may be, if any, in conflict with the foregoing, is withdrawn and overruled.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 4, 1943.

Dr. B. F. Austin, Secretary,

State Board of Medical Examiners,

Montgomery, Alabama.

State Board of Medical Examiners—Narcotics—Physicians—

1. State Board of Medical Examiners has no authority to have physician-addicts committed by court for treatment, other than procedure applicable to all narcotic-addicts provided for in Title 22, Section 249, Code of 1940.

2. Revocation of physician's certificate of qualification does not empower State Board of Medical Examiners to obtain possession of certificate.

Opinion by Assistant Attorney General Hawkins.

Dear Sir:

This will acknowledge receipt of your request for official opinion under date of May 20, 1943, which is as follows:

"The State Board of Medical Examiners during the past twelve years, since the Federal Bureau of Narcotics in 1930 was permitted to divulge information in its file relating to physicians who violate the Harrison Narcotic Act, either by their personal use of narcotics obtained on governmental forms or for selling such drugs, has attempted to rehabilitate physicians who are addicts by requiring them to take treatment in one of the United States Public Health Service Hospitals or have their certificates of qualification to practice medicine in this State revoked.

"Unless physician-addicts are sentenced by the courts and committed to one of these hospitals for treatment, we find that little can be accomplished on a purely volunteer basis because such addicts may request and receive leaves of absence at will. I should like, therefore, to have your opinion as to whether the State Board of Medical Examiners may have a physician-addict committed through the courts when his case has not been within the jurisdiction of the court.

"Further, I should like your opinion as to how the State Board of Medical Examiners may legally require a physician, whose certificate of qualification to practice medicine in the State of Alabama has been revoked, to return it to the Board. As you may know, the Board issues said certificates under the law, but cannot force a physician to return it in the event it is revoked because it has become, on issuance, personal property."

In answer to your first question as to whether the State Board of Medical

Examiners may have a physician-addict committed by a court to an institution for treatment, reference is made to Title 22, Sections 249 and 250, Code of 1940, which statutes provide the only method of such commitment.

Title 22, Section 249, Code of 1940, authorizes any person claiming to have knowledge of any other person's habitual use of narcotic drugs so as to endanger public morals, health or welfare or who is so addicted as to have lost the power of self-control, to file a verified affidavit of such facts with the solicitor of the judicial circuit of any county in which such habitual user may be found. The statute further provides for notice to be given to the user of narcotics to appear before a court of competent jurisdiction, such notice to be served by the sheriff. Title 22, Section 250, Code of 1940, provides the manner in which the hearing shall be conducted and authorizes the court to commit the addict for treatment.

You will note that these statutes are not confined to physicans but apply to any persons addicted to the use of narcotic drugs. Any person with knowledge of such facts may make the required affidavit.

A study of the Alabama laws discloses that these statutes are the only provisions for the commitment of narcotic addicts, and, therefore, the State Board of Medical Examiners is without authority to effect such commitment except by compliance therewith. The Federal Statutes (U. S. C. A., Title 21, Sections 171 to 193, and 221 to 237) establish the United States Public Health Service Hospitals for the treatment of narcotic addicts, which treatment however is prescribed only for those volunteering to take the same and addicts violating the Federal laws as fraudulent importation and selling of narcotics. These statutes provide no procedure which would enable the commitment of a physician by the State Board of Medical Examiners.

In answer to your second question, it is my opinion that the State Board of Medical Examiners has no legal authority to require a physician, whose certificate of qualification has been revoked, to return such certificate to the Board. Title 46, Section 265, Code of 1940, requires a physician to file the certificate in the office of the Judge of Probate of the County in which he is located. This section further provides that a physician may voluntarily surrender his certificate to the State Board of Medical Examiners if he does so in writing with two witnesses. However, no provision is made for compelling such surrender; rather upon the revocation of a certificate by the State Board of Medical Examiners, which, of course, by virtue of Title 46, Section 270, Code of 1940, can be done because of a physician's excessive use of narcotics, written notice of such revocation shall be forwarded to the Judge of Probate of the County in which the certificate is recorded, and the Judge of Probate shall make an entry thereof on the margin of such recorded certificate (Title 46, Sections 286 and 287, Code of 1940). These are the only provisions made for the nullification of a certificate, and I find no authority for the recovery by the State Board of Medical Examiners of the certificate. Of course, in the event such certificate were used to enable the physician to unlawfully practice medicine or were otherwise fraudulently used, a court of competent jurisdiction possibly would issue a restraining order and demand the surrender of the certificate, but in the absence of such conditions the State Board of Medical Examiners has no means of acquiring possession

of the certifiifcate.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 5, 1943.

Mr. J. S. Ganey, Superintendent,

Alabama Institute for Deaf and Blind,

Talladega, Alabama.

Alabama Institute for Deaf and Blind—

May not be sued by injured employee.

Opinion by Assistant Attorney General Smith.

Dear Sir:

Your request for an official opinion, bearing date of May 27, 1943, is as follows:

"Will you please give me the following information:

"In case of an accident involving injury to any employee of this institution, what is our liability?

"Are our employees insured against such contingency as noted above and, if so, what is the coverage?

"I shall thank you for a reply at your earliest convenience."

In my opinion the Alabama Institute for Deaf and Blind is not liable in the event of an accident involving injury to an employee. This institute exists under and by virtue of Title 52, Section 519, et seq, of the 1940 Code, which reads pertinently as follows:

"§519. Consolidation of institutes.—The institution heretofore established for the education of the deaf, *** and the institution heretofore existing for the education of the blind, *** are hereby consolidated and shall be a body corporate under the name of "Alabama Institute for Deaf and Blind," and by that name may sue and be sued, *** ."

Section 14, of the 1901 Constitution of Alabama, reads as follows:

"That the State of Alabama shall never be made a defendant in any court of law or equity."

The leading case in point appears to be **White v. Alabama Insane Hospital,** 133 Ala. 479, 35 So. 454, wherein the plaintiff sought recovery for personal injuries under the "Alabama Employer's Liability Act," and from which we quote:

"This brings us to a consideration of the question whether the act incorporating the defendant authorized this character of suits to be maintained against it. It is true that the act provided in general terms that it may be sued. But if legislative competency be conceded to exist to grant such authorization, this one is insufficient as a grant of authority that it may be sued for every tort that may be committed by its officers, agents, or servants. This question is ably discussed and fully considered in the cases of Maia's Adm'r v. Eastern State Hospital and Moody v. State Prison, cited above, in each of which the conclusion is reached that a general authorization like the one pointed out is not sufficient authority to sue in this class of cases."

The Supreme Court of Alabama later held in the case of **Cox v. Board of Trustees of University of Alabama,** 161 Ala. 639, 49 So. 814, that:

"Public institutions, created by the state purely for charitable or educational purposes, are a part of the state, together with all the property held by such institutions, and they are not subject to action, though their charters and **acts incorporating them expressly provide that they may sue and be sued, since Const. 1901, § 14, prohibits the state from being made a party defendant in any suit of law or equity."** (Emphasis supplied)

Both of the above cases were cited as authority in **Harmon v. Alabama College,** 117 So. 747.

It is my further opinion that your second inquiry must also be answered in the negative. Since the Alabama Institute for Deaf and Blind is not liable for the negligent or tortious acts of its agents or employees it cannot suffer any pecuniary loss arising from any such act of their agents or employees, it necessarily follows that the Board of Trustees of the Alabama Institute for the Deaf and Blind is without authority to pay premiums on this type of insurance. See Quarterly Reports of the Attorney General, Volume VI, page 66, and Volume XXII, page 127, for opinions and analogous situations.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 7, 1943.

Hon. Ben C. Morgan,

Acting Director of Conservation,

Capitol.

Streams—Title to the beds of navigable streams in Alabama is vested in the State in trust for public purposes, subordinate, however, to the right of the federal government to regulate navigation and foreign and interstate commerce—

The State has a legal right to lease the beds of its navigable streams so long as the leased property is used for purposes not inconsistent with public interests and the lease is made subject to the right of the federal government to control navigation and commerce.

Opinion by Assistant Attorney General Savage.

Dear Sir:

Your request for an official opinion bearing date of May 31, 1943, is as follows:

"There is a party who desires to lease from the State of Alabama the bed of the Alabama River. The River passes through the center of a block in which such party is to drill for oil. If a lease were executed, the leased property would be described as follows:

" 'The bed of the Alabama River lying within Township 7 North, Range 5 East. Said land being the ordinary bed of the Alabama River which follows the meanderings of said River through Township 7 North, Range 5 East in Monroe and Clarke Counties, Alabama.'

"The matter of this lease has been discussed with Governor Sparks and Hon. A. M. McDowell. Mr. McDowell requested that I get an opinion from you on the question as to whether the State has the legal right to lease the bed of the Alabama River.

"In May, 1941, Governor Frank M. Dixon on behalf of the State leased to Union Producing Company the bed of the Tombigbee River, lying within Township 7 North, 8 North, and 9 North, Range 1 West, in the counties of Clarke, Washington and Choctaw, Alabama. It is my understanding before such lease was made, there was some discussion with your office concerning the State's right to lease the beds of its rivers or navigable streams but so far as I am aware no written opinion was given by your office on the question.

"The party desiring the lease in question advises that time is running against him on his contracts with other landowners, and that he desires to be advised of the attitude of the Governor's Office at the earliest possible date.

"Dr. Stewart J. Lloyd, State Oil and Gas Supervisor, tells me that Governor Sparks is willing to make the lease if the State may legally enter into such a lease.

"It would be appreciated, therefore, if you would advise me on the question at your earliest convenience."

Your question makes it necessary to determine first whether the Alabama River, at the place where its bed is contemplated being leased, is navigable. It is my information that it is a matter of common knowledge that the Alabama River is navigable at such place.

Section 113 of Title 8 of the Code of 1940 provides in part as follows:

"All the beds and bottoms of the rivers, bayous, lagoons, lakes, bays, sounds, and inlets within the jurisdiction of the State of Alabama are the property of the State of Alabama to be held in trust for the people thereof, *** ."

In construing Section 2724 of the Code of 1923, which is the same as said Section 113, except for the proviso added to Section 113 by amendment in 1936-1937, extra session, page 192, the Supreme Court of Alabama held:

"The state owns the bed and bottom of navigable streams in Alabama, but not those which are nonnavigable. Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565. The latter constitutes a part of the public land ceded to the United States April 24, 1802, Code 1923, p. 24, surveyed and patented by the government as such, by which the title passed to the patentees and their successors in ownership, and is conveyed by the description of the land through which the streams run, *** ." (Hood v. Murphy, 231 Ala. 408.)

Again, in **State ex rel. The Attorney General v. The Alabama Power Company,** 176 Ala. 620, our Supreme Court held:

"In Alabama the legal title to the beds and waters of navigable ways is lodged in the state in trust for public purposes; subordinate, however, to the supreme right of navigation which is lodged in the United States as trustee for all the people of all the states.—**City of Mobile v. Eslava,** 9 Port. 577, 596-604; 33 Am. Dec. 325; 1 **Farnham on Waters,** § 536; **Mobile Transportation Company v. City of Mobile,** 128 Ala. 335, 349, 30 South. 645, 64 L. R. A. 333, 86 Am. St. Rep. 143, and authorities there cited; **Mobile Transportation Company v. Mobile;** 187 U. S. 479, 23 Sup. Ct. 170, 47 L. Ed. 266. Subject to the stated limitation in favor of the supreme right of navigation reposed in the United States, this state may even grant the fee in the trust properties to which reference has been made; provided the grant is not inconsistent with public interests to which the navigable water ways are permanently, originally, dedicated.—**Mobile Transportation Company v. Mobile,** 128 Ala. 335, 349, 30 South. 645, 64 L. R. A. 333, 86 Am. St. Rep. 143; 1 **Farnham on Waters,** § 44. It is finally settled in and for this state that the line of public (state) ownership of the bed and shores of nontidal navigable water ways is low-water mark.—**Webb v. Demopolis,** 95 Ala. 116, 13 South. 289, 21 L. R. A. 62; **Williams v. Glover,** 66 Ala. 189;

Demopolis v. Webb, 87 Ala. 670, 6 South. 408. *** "

While it is settled law in this state that the title to the beds and bottoms of navigable streams in this state is vested in the state in trust for public purposes, yet the state's title thereto is subordinate to the supreme right of navigation which is lodged in the United States as trustee for all the people of all the states. See **State ex rel. The Attorney General v. Alabama Power Company,** supra.

Section 104 of Title 38 of the Code of Alabama 1940 is as follows:

"All navigable waters in this state are public thoroughfares."

Section 107 of Title 38 of the Code of Alabama of 1940 imposes a fine of not less than one hundred nor more than one thousand dollars upon any one being found guilty of damming up or otherwise obstructing a navigable watercourse in this state.

Therefore, assuming that the Alabama River lying within Township 7, North, Range 5 East, in Monroe and Clarke Counties, Alabama is navigable, I am of the opinion that the State of Alabama has a legal right to lease the bed thereof at such location, provided the lessee is not to use the bed of the river in such a manner as to be inconsistent with public interests and that such lease is made subject to the right of the federal government in respect to its control over navigation and foreign and interstate commerce.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 7, 1943.

Hon. Frank N. Julian,

Superintendent of Insurance,

Department of Insurance,

Capitol.

State Board of Adjustment—State Board of Compromise—Code 1940, Tit. 55, §§ 333-4—Code 1940, Tit. 51 § 816—

Decree of State Board of Adjustment or State Board of Compromise releasing liability or refunding money paid by foreign insurance company, under Code 1940, Tit. 51, § 816, as license tax, by reason of doubt as to liability, will not be construed to release further accruing liability for such tax.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of May 27, 1943, is as follows:

"We respectfully request your opinion and interpretation of the following decree, rendered by the State Board of Compromise in the State of Alabama versus Acacia Mutual Life Insurance Company, et als.

"It will be noted in this decree the following:

" 'It is, therefore, ordered, adjudged and decreed that said companies be and they hereby are forever released and discharged from any and all liability as to premium taxes upon considerations for annuity business done in Alabama for the year 1935 and preceding years on the condition, however, that said companies pay to the State of Alabama the premium tax of 2½% upon considerations for all annuity business done in the State of Alabama in 1936 and 1937 and subsequently thereto as said taxes mature.'

"Our interpretation of this decree is that the companies involved were released and discharged from all premium taxes accrued through the year 1935 and that all considerations for annuities received from that date forward were subject to the premium tax of two and one-half percent. Therefore we have in the past collected this tax from all companies involved which do an annuity business in Alabama on this basis.

"In 1942, however, the New England Mutual Life Insurance Company, one of the companies involved in the aforesaid decree, filed a petition with the State Board of Adjustments asking for a refund of the premium tax paid in 1942 for considerations for annuities received during the year 1941 on annuity contracts written during 1935 and previous

years. This Company's interpretation of the decree is that they are not liable for considerations for annuities, or premiums, on any annuity contract or policy written during that time although the premiums are received currently. The Board of Adjustments awarded this Company the amount asked for in their petition.

"We have made claim against this Company for the premium tax on all considerations for annuities received during 1942 regardless of when the contracts were issued. They have not paid because of the facts set forth above.

"Therefore, please advise us of your interpretation of this decree and give us your opinion as to whether or not this Company, as well as all others involved, is liable for the premium tax on these considerations for annuities during the year they are received regardless of when the contracts were issued."

The tax levied annually under Code 1940, Tit. 51, § 816, is imposed on foreign life insurance companies as a condition to their doing business in the State, and is measured by "gross premiums received *** for business done *** during the year ending the thirty-first day of December preceding *** as a privilege tax or license for doing business in this State during the current year." In other words the privilege of doing business in the State for any one year is valued upon the basis of premiums received during the next preceding year.

I find nothing in Section 816 and the related Section 817 to indicate that it is material to ascertain when the policies were originally issued under which the premiums are paid.

The decree or order of the State Board of Compromise rendered December 30, 1938, upon the petition of the Acacia Mutual Life Insurance Company and numerous other companies, from which the last paragraph is above quoted, while purporting to release them from liability with respect to premiums received in 1935 and prior years, on the basis of doubt as to such liability, does not purport or undertake to release them from any future liability accruing with respect to subsequent years, and even if it did undertake to release such subsequent liability it would run afoul of Section 100 of the Constitution, which forbids the release or diminution of liability except by payment thereof, with provision for compromise of doubtful claims.

To accord any other meaning to the aforementioned decree or order of the Board of Compromise, or to construe it as a release in advance of subsequent accruing liability would imply assumption by the Board of authority or power denied it by Section 100 of the Constitution.

Nor is it material, in my opinion, that the State Board of Adjustment refunded to New England Mutual Life Insurance Company a part of premium tax paid by it in 1942 with respect to premiums received in 1941 on policies issued in 1935 and prior years.

I am of opinion, therefore, and so advise, that New England Mutual Life Insurance Company and the other companies involved in the decree of De-

cember 30, 1938, must pay a premium tax in 1943, measured by gross premiums received in 1942, without regard to the date of issue of the policies or annuity contracts with respect to which the premiums were paid,—assuming that annual payments under annuity contracts are premiums within Code 1940, Tit. 51, § 816.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 10, 1943.

Hon. Gordon Persons,

Associate Commissioner,

Alabama Public Service Commission,

Capitol.

Code 1940, Tit. 48, § 302(4)—Public Utilities—Public Service Commission—Butane Gas.—

A company or person engaged in the business of manufacturing, selling and distributing butane gas, by sale and delivery of drums or by installation of a storage tank from which gas is piped into the homes of consumers, without grant of any public franchises or exercise of the power of eminent domain, is not subject to regulation by Alabama Public Service Commission.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for my opinion bearing date of June 4, 1943, is as follows:

"The Commission requests an opinion from your office as to whether or not a company distributing Butane gas for cooking and heating purposes comes within the jurisdiction of the Public Service Commission.

"Generally speaking, there are two methods by which Butane gas is distributed, one is by means of containers, whereby the gas is kept in individual drums and delivered by truck, or otherwise, directly to the homes and the full drum is substituted for the empty one.

"The other method is where the Butane Company has a large storage tank in which the gas is kept under pressure and piped directly from the storage tank to the consumers' homes. In this case, we think the Butane

Company should be subject to regulation by this Commission, as the mere fact that gas is either Butane or manufactured or natural product, is of no consequence. However, the Butane method of delivery by means of individual containers in which there is no physical connection between the consumer's home and the Company's storage plant seems to present another problem.

"We respectfully request an opinion from your office at the earliest possible moment."

It may be conceded for the sake of argument that the Butane Company comes within the literal definition of a public utility in Code 1940, Title 48, Section 302, as being a corporation or person "not engaged solely in interstate business that now or may hereafter own, operate, lease or control *** (4) any plant, property or facility for the manufacture, storage, distribution, sale, or furnishing to or for the public of natural or manufactured gas for light, heat, or power or other uses." The question is, however, not merely one of definition. The essential question is whether its business conducted in the manner above stated is within the meaning of the law affected with a public interest.

It does not appear that the company enjoys public franchises or engages in a business of a monopolistic nature or that in carrying on its business it is clothed with or exercises the power of eminent domain. For aught appearing it is merely engaged in the manufacture, sale and distribution of a commodity used for the purpose of generating heat, on the same footing that an ice company manufactures, sells and distributes ice for purposes of refrigeration, or that an oil refiner may distribute fuel oil to its customers to heat their houses in the winter.

In my opinion, the decision of the Supreme Court in **New Ice Company v. Liebmann,** 285 U. S. 262, 277, 76 L. Ed. 747, 52 S. Ct. 371 (1932), is fatal to any contention that the Butane Company, under the facts above stated, is subject to regulation as a public utility by the Alabama Public Service Commission.

In that case it appears that the State of Alabama undertook by statute to declare the business of manufacture, sale and distribution of ice to be subject to regulation in such wise as to require a permit or license to be issued by a state commission before any person could engage in such business in a community already served by some other ice dealer or manufacturer. It was contended that such a business was affected with a public interest and, therefore, subject to regulation to the same extent as any public utility as the term is ordinarily understood is subject to regulation.

After discussing the grounds on which it had been held that the business of operating grist mills in times past and more recently the business of operating cotton gins are affected with a public interest and subject to regulation by state commission, the court, speaking through Mr. Justice Sutherland, on page 277, said:

"Here we are dealing with an ordinary business, not with a paramount industry upon which the prosperity of the entire state in large measure depends. It is a business as essentially private in its nature as

the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. It may be quite true that in Oklahoma ice is not only an article of prime necessity, but indispensable; but certainly not more so than food or clothing or the shelter of a home. And this court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation on the basis of a public use; and that the same is true in respect of the business of renting houses and apartments, except as to temporary measures to tide over grave emergencies. See Tyson & Bro. v. Banton, supra, pp. 437-438, and cases cited."

Again on page 278 it was said that "regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business such as that under review cannot be upheld consistently with the fourteenth amendment." It is also pointed out that "nothing is more clearly settled than that it is beyond the power of a state under the guise of protecting the public, arbitrarily to interfere with private business or prohibit lawful occupations or impose unreasonable or unnecessary restrictions upon them."

On page 279 it is further said:

"We are not able to see anything peculiar in the business here in question which distinguishes it from ordinary manufacture and production. It is said to be recent; but it is the character of the business and not the date when it began that is determinative. It is not the case of a natural monopoly, or of an enterprise in its nature dependent upon the grant of public privileges. The particular requirement before us was evidently not imposed to prevent a practical monopoly of the business, since its tendency is quite the contrary. Nor is it a case of the protection of natural resources. There is nothing in the product that we can perceive on which to rest a distinction, in respect of this attempted control, from other products in commun use which enter into free competition, subject, of course, to reasonable regulations, prescribed for the protection of the public and applied with appropriate impartiality."

In view of the foregoing, under the well-established rule of statutory construction that where a statute is of uncertain meaning and admits of two constructions, one of which would render it unconstitutional, (or at least subject to grave doubt on constitutional grounds), and the other construction would be free from doubt, the latter construction will be adopted. In this instance, therefore, I feel that the definition of the public utility above quoted from the Alabama statute must be qualified with the proviso that the business therein defined as a utility must be of such nature and conducted under such circumstances as necessarily to affect it with a public interest within the well understood meaning of that phrase.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 17, 1943.

Hon. E. B. Norton,

Superintendent of Education,

Montgomery, Alabama.

State Board of Adjustment—Schools—

1. Board may order award payable from school funds.

2. Specific decree construed.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for an official opinion, bearing date of April 29, 1943, is as follows:

"On March 30, 1943, the State Board of Adjustments awarded Olivia H. Fernandez $200 because of damages suffered from a motor vehicle owned by the Board of Education of the City of Birmingham. On that same date the State Board of Adjustment awarded J. F. Bell the sum of $100 because of damages suffered from a motor vehicle owned by the Jefferson County Board of Education. The State Board of Adjustment ordered that both of these awards be paid from the Public School Funds of the Department of Education.

"The State Department of Education has available for general distribution to county and city school systems the PUBLIC SCHOOL FUND and the MINIMUM PROGRAM FUND. Your opinion is requested on the following questions:

"1. Shall these awards be paid from the MINIMUM PROGRAM FUND or the PUBLIC SCHOOL, or may they be paid from either fund?

"2. If these awards can be paid from one or both of the above funds, can the State Department of Education deduct from the amount of said fund or funds to which a board of education is entitled the amount paid from said fund or funds to parties who have been granted awards by the State Board of Adjustment or must the entire PUBLIC SCHOOL FUND or MINIMUM PROGRAM FUND bear the cost of such awards before distribution to county and city boards of education?"

The State Board of Adjustment is given authority by Title 55, Section 340, of the 1940 Code, to determine the agency of the state which inflicted the injury and to make the award payable from the appropriation to such agency. Section 340 provides as follows:

"§ 340. Determination of agency inflicting damage.—The board of

adjustment in its findings of facts and its findings and decrees as to the amount of payment may also find the agency, commission, board, institution, or department of the State of Alabama which inflicted the injury or damage complained of, if it finds there is injury or damage done to persons or property, and may adjudge and find that said damage shall be paid out of the appropriation made to the agency, commission, board, institution or department of the State of Alabama whose employees, servants, agents or instrumentalities inflicted the damages and injuries complained of. Provided, however, that the board of adjustment may order the payment of any claim out of any fund or funds appropriated for the purposes of this article. (1935, p. 1164.)"

It will be noted that this Section also provides that the Board may order the award paid from any fund appropriated. Section 343 of Title 55 dealing specifically with the appropriation provides as follows:

"§ 343. Appropriation for payment of awards.—There shall be appropriated annually out of the general fund of the State of Alabama, the state insurance fund, the Confederate veteran fund (after payment of all Confederate pensions), the fund of the department of corrections and institutions, the fund of the highway department, or any other fund of the state, to be determined by the board of adjustment, a sufficient amount, not exceeding $50,000 for any year, as may be necessary to pay the claims ordered paid by the board of adjustment."

In view of these sections, it is my opinion that the Board of Adjustment may properly order an award payable from state educational funds.

You ask whether or not the awards should be paid from the Minimum Program Fund or the Public School Fund. The decrees of the Board of Adjustment provide that the awards should be paid from the "Public School Funds of the Department of Education." This language is broad enough in my opinion to authorize the payment of the awards from either the Public School Fund or the Minimum Program Fund. It might be advisable, however, to request the Board of Adjustment to amend its decree to state specifically the fund from which such awards should be paid.

In answer to your question No. 2 it is my opinion that the award should be deducted from the fund prior to the distribution to the several county and city boards of education. The decree of the Board of Adjustment does not state that the award should be deducted from the funds to be received by any particular city or county board of education, and such a deduction would, in my opinion, be unauthorized.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 18, 1943.

Hon. G. R. Swift, Director,

State Highway Department,

Montgomery, Alabama.

Highway Department—Merit System—

Highway Director entitled to a confidential assistant or secretary.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for an official opinion, dated May 15, 1943, is as follows:

"Re: Title 55, Section 301, 1940 Code of Alabama, Confidential Assistant or Secretary.

"Please advise if I, as Director of this Department, have the authority under the code section stated above to employ either a Confidential Assistant or a Secretary who will be exempt from the "Merit System."

"In the event you hold the above authority exists, will you please advise who would determine the salary to be paid.

"Your opinion on the above, at your earliest convenience, will be appreciated."

Code of Alabama, 1940, Title 55, Section 301, provides in pertinent part as follows:

"The unclassified service shall include: One confidential assistant or secretary for each board, commission and elected officer. All employees of the governor's office not exempted."

The Director of the Highway Department is provided for by Title 23, Section 2, of the 1940 Code. This section provides as follows:

"§ 2. Highway director to be chief executive officer of department; appointment, etc.—The chief executive officer of the highway department shall be known as the highway director, who shall be appointed by the governor and shall hold office at the pleasure of the governor; all the powers, authority, and duties vested in the highway department shall be exercised by the highway director. (1927, p. 348; 1931, p. 7; 1939, p. 9.)"

It can be seen from the above quoted section that the Highway Director is not an elected officer. The question then arises as to whether or not the Highway Director comes within the definition of the word "commission" as is used in the above quoted portion of Title 55, Section 301. Prior to the

passage of Act No. 13, S. 23, approved February 3, 1939, General Acts 1939, page 9, the Highway Director was provided for by Section 1 of Act No. 10, H. 25, approved January 30, 1931, General Acts 1931, p. 8, which section provides in pertinent part as follows:

> "Section 1 (a) This Act shall be known and when cited or amended may be designated as "The Alabama Highway Code."
>
> "(b) (1298) State Highway Department Established: There is created a State Highway Department in the State of Alabama, which shall consist of **a State Highway Commission of one member.** The Highway Commissioner shall also be designated as Highway Director." (Emphasis supplied)

It will be noted from the above that the Highway Director was also a commission.

It is my opinion that it was the legislative intent to include the Highway Director within the above quoted portion of Title 55, Section 301, and therefore the premises considered, the Director of the Highway Department is entitled to a confidential assistant or secretary. Such employee would be in the unclassified service and his or her salary would be determined by the personnel board. This is specifically provided by the last sentence of Section 301 of Title 55, which provides as follows:

> "Employees in the unclassified service shall be subject to the same rules and regulations of employment as apply to employees in the classified service except as to appointment and dismissal."

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 18, 1943.

Hon. Roy Johnson,

Tax Assessor,

Jefferson County,

Birmingham, Alabama.

Code 1940, Title 51, §§ 15, 313—Homestead Exemption—Redemption

Upon redemption after the third Monday in January of the current tax year of property sold for taxes for a prior year and bid in by the State, the redemptioner is not entitled to homestead exemption as to such property for the current tax year, even though both before and after the sale for taxes and continuously up to the time of redemption he occupied and claimed such property as his homestead.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for an official opinion bearing date of June 8, 1943, is as follows:

"Your official opinion is respectfully requested on the following case which has already happened in Jefferson County.

"Mrs. Elizabeth M. Davis, owner of Lot 4, Mauchlins Resurvey, failed to pay her taxes for the tax year 1938. The State of Alabama acquired a lien on same at the subsequent tax sale. The above property was her homestead, and was occupied by her as such from 1935 to the date of this letter.

"Mrs. Davis redeemed her homestead on July 15th, 1941. She appeared at the assessor's office on July 16th, 1941, assessed said homestead property, and claimed homestead exemption for the tax year 1942, which had begun on October 1941.

"We allowed her claim to homestead exemption, acting under an official opinion from the Hon. A. A. Carmichael, Attorney General at that time, to support our action. This letter is enclosed for your perusal and we ask that it be returned when you have finished it.

"Were we correct in allowing homestead exemption in this case?

"We suppose that the question just stated involves these further questions: (a) When and under what statutes was assessment for the 1942 taxes due to have been made, and (b) when and under what statutes must homestead exemption have been claimed?

"Because the property was not subject to assessment from date of sale to redemption date, she had no opportunity to claim homestead exemption. It seems to us that if she is **required to revert to October 1st, 1941,** (beginning of the tax year 1942), to assess even though the third Monday of January is past, then she should be allowed to claim homestead.

"The Supreme Court of Alabama ruled in 1937, that because the homestead exemption law was passed after the third Monday in January that taxpayers had until the time Tax Collector set in motion the machinery of the State to collect, to claim exemption. Opinion of Justices, 234 Ala. 358."

The opinion of this office rendered at your request December 18, 1942, (Quarterly Report, Attorney General, Vol. XXIX, page 103) holds that where a taxpayer suffered his homestead to be sold for taxes and subsequently in August 1942, redeemed the same he was not entitled to the exemption for the tax year 1942.

Numerous prior opinions of this office were referred to in the opinion of December 18, 1942, all to the effect that the claim to exemption must be made on or prior to the third Monday in January next succeeding October 1 when the taxes were assessable. If the taxpayer does not own the property sought to be claimed as exempt on October 1 when the tax year begins, there is no basis for the claim of exemption for that particular year.

As pointed out in the opinion of December 18, 1942, assessment for the current year upon redemption after the third Monday in January of that year is to be made by the tax assessor and not by the redemptioner or taxpayer.

For answer to your several questions therefore I am of opinion:

(1) Mrs. Davis was not entitled to the homestead exemption allowed her for 1942 taxes, payable October 1, 1942, and you were not authorized to allow the exemption.

(2) (a) The assessment for 1942 taxes was due to be made pursuant to Code 1940, Title 51, § 313.

(2) (b) No claim to homestead exemption in this instance could be made until October 1, 1942, and thereafter at which time and thereafter until the third Monday in January 1943, Mrs. Davis was entitled to make the claim with respect to 1943 taxes, due October 1, 1943, under Code 1940, Title 51, § 51.

I am returning herewith the letter dated March 28, 1939, to yourself, signed Thos. S. Lawson, Attorney General. In the first paragraph at the top of page 3 of the letter reference is made to an opinion of this office rendered September 22, 1937, to Hon. W. E. Butler, Judge of Probate, Madison County (Quarterly Report, Attorney General, Vol. VIII, page 284). This opinion was cited as holding "that when a person redeemed property, even though he had owned and occupied it as a homestead before the date of sale

to the State for taxes and had continued to occupy it as a homestead after it was sold to the State for taxes, even though the State was entitled to possession, that the full amount specified by the 1935 Revenue Act should be collected from him when he redeemed the property **without allowing him any claim for homestead tax exemption during the years in which the State held title to the property.**" (Emphasis added.) This would seem to be in harmony with the opinion of this office rendered to you December 18, 1942.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 22, 1943.

Hon. A. B. Jefferies, Chairman,

Board of Revenue and Road Commissioners,

Mobile County,

Mobile, Alabama.

Counties—Automobiles—

County not authorized to repair or equip automobile not belonging to it though used partially for county purposes.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for an official opinion, bearing date of April 23, 1943, is as follows:

"The County Agent of this County has made a requisition on the Board to purchase a set of automobile tires and the making of certain repairs to an automobile owned by him personally, but used by him in the discharge of his official duties, which use, however, is not exclusive.

"I would respectfully request that you advise as to whether or not in your opinion this Board has the authority to purchase the automobile tires, and to make the repairs to this automobile from either the general fund of the County or from the County's share of the Sales Tax."

It is my opinion that counties are not authorized to purchase automobile tires or make repairs to automobiles not belonging to the county, although such automobiles are partially used for county purposes.

Courts of county commissioners, boards of revenue, or like governing bodies, are courts of strictly limited jurisdiction and can exercise only such limited powers as are conferred upon them by statute. Biennial Report, Attorney General, 1934-1936, p. 744.

I am unable to find any authority for the county to place equipment on or repair any personal property not belonging to the county.

This office has heretofore held in an opinion to Hon. Bradford Cooper, County Treasurer, Marion County, Alabama, dated July 20, 1933, Biennial Report, Attorney General, 1932-1934, p. 314, that a county cannot pay for repairs made to a truck which belonged to one of the county commissioners, and which was used partially for county purposes.

Therefore, the premises considered, it is my opinion that such an expenditure would not be authorized.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 23, 1943.

Hon. Grady Boyd,

Clerk-Register, Cleburne County,

Seventh Judicial Circuit,

Heflin, Alabama.

Jury Commissioners—Term of office—

Opinion by Assistant Attorney General Sykes.

Dear Sir:

Your request for an official opinion, bearing date of June 15, 1943, is as follows:

"I am writing you concerning the Jury Commission of Cleburne County. I am of the opinion that the Commissioners appointed by Gov. Dixon went out of office when his term expired but up to this time no new Commissioners have been appointed and the Jury box is almost exhausted and we will have court in August, 1943. I have two reasons for wanting your opinion on this matter. I am Circuit Clerk of Cleburne County also Clerk of the old commission.

"Should the old commission continue to work? Your information will be appreciated."

In my opinion the old commission may continue to work (1) for a reasonable time or (2) until the Governor makes new appointments and such appointees are qualified.

Title 30, Section 10, Code of Alabama, 1940, provides:

"Section 10. Members to be appointed by governor.—The governor shall appoint the members of the several jury commissions who shall constitute said several commissions during the governor's tenure of office and until their successors are appointed and qualified, and thereafter the governor shall appoint the members of said jury commissions for and only during the tenure of office of the governor making the appointment and until their successors are appointed and qualified. (Ib.)"

As stated in the statute above the jury commissioners are appointed by the governor to hold office "during the governor's tenure of office." Therefore, the terms of jury commissioners would ordinarily expire when the governor appointing them left office. However, the legislature has provided that the jury commissioner shall hold office for a period of time after the governor's tenure of office has expired, viz, "and until their successors are appointed and qualified."

This last phrase was, of course, placed in the statute so that the old jury commissioners would be legally authorized to perform their duties after a newly elected governor has taken office and before such governor has appointed new jury commissioners and such commissioners have qualified.

Thus the old jury commissioners may hold over and perform their duties for a reasonable period of time after a new governor has taken office. In my opinion the period of time since our former governor left office to the date of this opinion (approximately five months) cannot be said to be an unreasonable length of time for "holding over" in this particular office, taking into consideration the normal tenure of office of the governor and the frequency of the meetings of the jury commissioners and other circumstances. See **City Council of Montgomery v. Hughes,** 65 Ala. 201; **Prowell v. The State ex rel. Hasty,** 142 Ala. 80; Quarterly Report of the Attorney General Vol. 15, p. 249; Biennial Reports of Attorney General, 1926-1928, p. 51; Biennial Report of Attorney General, 1919-1920, p. 76.

It is my opinion, therefore, that the old commission may continue to work:

1. Until the expiration of a reasonable length of time, or

2. Until the governor shall have appointed the new jury commissioners and such appointees shall have qualified.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 23, 1943.

Hon. Roy Johnson,

Tax Assessor, Jefferson County,

Birmingham, Alabama.

Records—Tax Assessor cannot destroy docket sheets of Board of Equalization or letters of protest.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

This will acknowledge receipt of your request for official opinion under date of May 22, 1943, which is as follows:

"The office of Tax Asesssor of Jefferson County is being crowded out with old documents and files of all descriptions, which have long since served their purpose, and I would like to inquire if it is necessary for the Assessor to keep old Board of Equalization or Board of Review docket sheets after the books have been audited and the taxes paid.

"We have several hundred thousand letters of protest and Board of Review docket sheets dating back for fifteen years, and our books have been audited up through and including 1941. Is it necessary for us to keep these old docket sheets any longer?"

I cannot advise that you destroy old docket sheets of the Board of Equalization or Board of Review, or letters of protest, even though such letters and records have apparently long since served their purpose.

I call your attention to the following provision of the Code of Alabama, 1940:

"Public officers shall keep complete books, papers, etc.—All public officers and servants shall correctly make and accurately keep in and for their respective offices, or places of business all such books, or sets of books, documents, files, papers, letters and copies of letters, as at all times to afford full and detailed information in reference to the activities or business required to be done or carried on by such officer or servant, and from which the actual status and condition of such activities and business can be ascertained without extraneous information; and all of the books, documents, files, papers, letters, and copies of letters so made and kept shall be carefully protected and safely preserved, and guarded from mutilation, loss or destruction." (Title 41, Section 139)

"Closed books of officers; to whom delivered.—All public officers and servants of the state whenever any book, paper or document pertaining to the affairs, business or transactions of their office, has ceased to be current, shall deliver the same together with a list of such books, papers and documents, to the director of the department of archives and history,

receiving in return therefor a receipt from such director which shall also contain a list of such books, papers, and documents, and all such books, papers, and documents of officers and servants of counties and cities shall be, when they cease to be current, in like manner delivered to the probate judge of such county, and to the mayor, president of the city commission or other executive officer of the city, and in like manner, such officer to whom such books, papers and documents are delivered shall give his receipt therefor." (Title 41, Section 141)

"Public officer or servant defined.—A public officer or servant, as used in this article, is intended to and shall include, in addition to the ordinary public offices, departments, commissions, bureaus and boards of the state, and the public officers and servants of counties, cities and towns, all persons whatsoever occupying positions in state institutions." (Title 41, Section 144).

It is my opinion that you cannot destroy any of your papers, docket sheets, and letters, but must dispose of them only in accordance with the above Code sections.

See also XIX, Quarterly Report of the Attorney General, 110, and Biennial Report of the Attorney General, 1926-1928, page 549.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 23, 1943.

Hon. E. B. Norton, Superintendent,

State Department of Education,

Capitol.

Title 52, Section 100—Trustees—Nomination—Who may participate.

Opinion by Assistant Attorney General Sykes.

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of May 27, 1943, which is as follows:

"Under the provisions of Section 100 of Title 52 of the Code of Alabama, 1940, does a qualified elector residing in the territory served by a school have the right to participate in the nomination of school trustees

for the school serving that territory, if that elector does not have a child in that school?"

In my opinion your inquiry must be answered in the negative. Section 133, Alabama School Code of 1927, provides:

"§ 133. Trustees, How Selected.—The County Board of Education shall appoint for every school in the County from six discreet, competent and reliable persons of mature years nominated by the patrons of the said school, three persons residing near the schoolhouse, and having the respect and confidence of the community, to serve as trustees of the school, to care for the property, to look after the general interests of the school, and to make the County Board of Education, through the County Superintendent of Education from time to time, report of the progress and needs of the school, and of the will of the people in regard to the school."

This section was amended by Act of 1935, page 1092, by adding:

" *** provided, that the term 'patrons' as used herein shall be construed to mean the parents and guardians of children in attendance at the school and, whether parents or guardians or not, qualified electors residing in the attendance district of the school."

On May 2, 1936, this office rendered an opinion (Biennial Report of Attorney General, 1934-1936, p. 648) holding that the legislature did not intend to allow all qualified electors residing in the attendance district of the school to participate in the nomination of school trustees. The opinion referred to above is based on the theory that the legislature in enacting the Act of 1935 attempted to allow all qualified electors residing in a well defined area served by the school to participate in the nomination. As a matter of fact, the schools do not draw their pupils from any well defined area and the Attorney General writing said opinion would not "convict the legislature of doing a nonsensical and perfectly ridiculous thing."

Thus the Superintendent of Education was advised to disregard the provisions of the statute that attempts to include "qualified electors residing in the attendance district of the school" as "patrons."

When the 1940 Code was adopted the words "attendance district" were changed to "territory served." It is my opinion that this latter term is subject to the same criticism as that announced in the opinion referred to.

When the legislature adopted Title 52, Section 100, in its present form it evidently proceeded on the assumption that under the school laws of this state schools draw their pupils from a certain well defined section, the boundaries of which are well known. Such is not the case. There may be several schools in one attendance district, and the "territory served" by one school may and does overlap the "territory served" by another school. The "territory served" by a particular school must mean the geographical area from which it may draw pupils. The geographical area from which schools may draw pupils does not have a fixed boundary. The area varies from year to year and even from month to month depending on the construction of roads, the routes traveled by school buses, and private automobiles bringing children to school, the age and academic standing of the

pupil, and even in some cases a pupil's or parent's preference of one school over another. And there are various other factors causing this geographical area to change constantly. Furthermore, the territory served by a school usually consists of that territory nearest a transportation route. These transportation routes cross and recross and children living nearer to one school may attend another school not because of their proximity to the school but because of their proximity to transportation facilities.

"Qualified electors residing in the territory served by the school" then is a meaningless term because no one can determine whether any particular school serves or would serve the area in which a particular qualified elector without children lives.

Therefore, since it cannot be determined whether a qualified elector resides in the territory served by the school, you are advised that only the parents and guardians of children in attendance at the school can participate in the nomination of trustees as provided by Title 52, Section 100, Code of Alabama, 1940.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 23, 1943.

Hon. David W. Crosland,

Tax Assessor, Montgomery County,

Montgomery, Alabama.

Taxation—Redemption—

Code 1940, Title 51, Section 313—

Property redeemed from the State by a municipality is not liable for taxes for the current year.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for an official opinion, bearing date of May 15, 1943, is as follows:

"In 1936 certain real estate located in the City of Montgomery, Alabama, was sold for State and County taxes, and bought in at the sale in

the name of the State of Alabama. In October of 1940 the owner of this property, in whose name it was assessed when sold for taxes, gave a deed to the property to the City of Montgomery. Subsequently, and on February 12, 1942, the City of Montgomery redeemed this property from the State through the Probate Court of Montgomery County. The amount paid on the redemption included all taxes through those for the year 1941, which came due October 1, 1941. Since the property was bought in the name of the State of Alabama in 1936, it has been carried on the records in the office of the Tax Assessor of Montgomery County in the name of the State. No taxes have been paid on the property for the year October 1, 1941, to October 1, 1942, and it is still owned by the City of Montgomery.

"Please give me your opinion as to whether, under the above circumstances, this property is subject to taxes for the year October 1, 1941, to October 1, 1942; and whether it should be advertised and sold for these taxes on failure of the City of Montgomery to pay same."

It is my opinion that the property described in your inquiry is not liable for ad valorem taxation for the tax year October 1, 1941, to October 1, 1942.

The property having been bought in by the State at a tax sale was not liable for taxes for the period it was held by the State. Constitution of Alabama, Section 91; Code of Alabama, 1940, Title 51, Section 2.

The redemption of property from tax sales is purely a statutory procedure and in effecting a redemption of property sold for taxes all the various statutory provisions must be complied with. Section 304 (a) of Title 51 of the 1940 Code, which deals with the redemption of lands which has been bought at tax sale by the state provides as follows:

"In order to obtain the redemption of land from tax sales, where the same has been heretofore or hereafter sold to the state, the party desiring to make such redemption shall deposit with the judge of probate of the county in which the land is situated, the amount of money for which the lands were sold, with interest thereon at the legal rate of interest prevailing at the time said property was sold for taxes, together with the amount of all taxes found to be due on such land since the date of sale, as provided herein, with interest thereon at the legal rate of interest prevailing from the maturity of such taxes, and all costs and fees due to officers."

It will be noted that the back taxes are not paid, as land belonging to the state is exempt from taxation, but an **amount equal to the taxes** must be paid before redemption may be effected.

Section 313 of Title 51 of the 1940 Code, further dealing with the redemption of property bid in by the state at tax sales, provides as follows:

"Within five days from the redemption of any real estate bid in by the state, the judge of probate shall notify the tax assessor and tax collector of his county thereof, and shall, on demand, pay to them the costs and fees to which they are respectively entitled; and the assessor shall

enter such real estate, and the name of the person redeeming the same, on an appropriate list to be kept by him for assessment. (1935, p. 256.)"

The above quoted section was formerly Section 277 of the 1935 Revenue Act. This office in construing Section 277 of the 1935 Revenue Act held that property redeemed from the State should be assessed for the current year's tax by the person redeeming it, and if this is not done by the end of the current tax year the property may be assessed against the redeemer as an escape. Biennial Report of the Attorney General, 1934-1936, pp. 780, 784; Quarterly Report Attorney General, Volume XVIII, p. 183.

In view of the foregoing we submit that the question of whether or not property redeemed from the state is subject to ad valorem taxation for the current year resolves itself into a question of whether or not the redeemer is exempt from the payment of taxes. The duty is placed upon such redeemer to assess the property for redemption. If the property redeemed is not exempt from taxation then the redeemer must assess the property and pay the taxes thereon when they become due the following October. If, however, the redeemer is a municipality, the property of which is exempt from ad valorem taxation (Constitution, Section 91, Code 1940, Title 51, Section 2) the property would not in my opinion be liable for ad valorem taxation for the current year any more than would other municipal property.

Therefore, the premises considered, you are advised that the property described in your inquiry is not in my opinion liable for state and county ad valorem taxation for the tax year October 1, 1941, to October 1, 1942.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 25, 1943.

Hon. S. Y. Moon,

Clerk and Register,

Clay County,

Ashland, Alabama.

Trial Tax—Workmen's Compensation Law—

Where a case is settled out of court involving the Workmen's Compensation Act, and the settlement is carried into court and docketed for the purpose of record and getting the approval of the court of said settlement, such cases do not require trial tax.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion bearing date of June 19, 1943, is as follows:

"Please give me an official opinion on the following question:

"'Should I, as Circuit Clerk, require a Trial Tax of $3.00 to be paid on cases arising under the Workmen's Compensation Act, which cases are not litigated but filed and placed on the docket?'

"Enclosed is a letter which raises the question in my mind."

My answer to the above is in the negative. It is true, this office, in an opinion written to Hon. L. J. McPherson, Clerk of the Circuit Court of DeKalb County, (Biennial Report of the Attorney General, 1934-36, page 246) held that a trial tax of three dollars was chargeable in all cases brought under the Workmen's Compensation Act that went on the docket of the circuit court, but this was before the adoption of the Code of 1940. The above opinion of this office was upheld by the Court of Appeals later on in the case of the **State v. Montevallo Coal Mining Company,** Alabama Court of Appeals, Volume 29, page 318. But since the opinion of this office and the case of the Montevallo Coal Mining Company, supra, came out the law on trial tax has been amended, as shown by Title 51, Section 20, Code 1940, and the part I refer to is where said section says:

"No trial tax shall be imposed in workmen's compensation cases settled by agreement of parties without a trial."

It appears from the above quoted portion of Section 20, supra, that when Workmen's Compensation cases are settled by agreement of the parties without a trial, no trial tax attaches. This is true even though the case is dock-

eted in order to get the approval of the Judge for such settlement.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 25, 1943.

Mr. G. W. Cuninghame, Register,

Circuit Court, Marengo County,

Linden, Alabama.

Trial Tax—When chargeable in condemnation in prohibition cases—

Where petition or bill if filed in the Circuit Court seeking to condemn an automobile or other vehicle used in the transporting of liquor and the State is successful in condemning such vehicle a trial tax of three dollars is chargeable, but on the other hand, where the State fails to condemn and is required to pay the costs no trial tax can be charged against the State.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your request for an official opinion, bearing date of June 16, 1943, is as follows:

"Please advise me whether or not I should collect the regular $3.00 State and County tax on cases where Sheriff seizes an automobile loaded with whiskey, and where the Court orders the car confiscated and the proceeds from the sale of the car to be turned over to the State after cost in the case is paid."

My answer to your request is in the affirmative. I call your attention to Title 51, Section 20, Code 1940, where it says:

"A trial tax of three dollars is imposed in each case, civil, criminal and equity, which is docketed in the circuit court in this State to be taxed as other costs *** "

Therefore, where a claimant fails in establishing his claim and the cost is adjudged against him or where no claimant appears and the car is adjudged confiscated and sold under the statute, a trial tax of three dollars attaches. This, it is true, is an action in rem against the automobile or other vehicle

for conveying prohibited liquors and if the State is successful and condemns and sells the property, as in the present case, and the trial tax attaches. This answers your question, but in order that what I say above may not be confusing, I think it necessary for me to add, if on the other hand the complainant is successful in establishing his claim and the State fails in its condemnation proceeding, the cost, under Title 29, Section 254, Code 1940, is paid by the State but in this event no trial tax can be charged as this office has held that the State is never liable for trial tax. **Biennial Report, Attorney General, 1934-36, page 164.**

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 30, 1943.

Hon. Frank O. Deese,

Judge of Probate, Dale County,

Ozark, Alabama.

County commissioners or boards of revenue may not appropriate county funds for the purchase of United States flag and State flag for display on court house lawns.

Opinion by Assistant Attorney General Brassell.

Dear Sir:

Your request for an official opinion, bearing date of June 23, 1943, is as follows:

"The Court of County Commissioners of Dale County wish to purchase a United States flag and possibly a flag of Alabama for display on the Court House lawn, but, are not certain whether the Court has the legal right to buy and pay for these flags from county funds.

"I am asking your opinion as to whether the Court may do this."

The court of county commissioners or governing body of a county is a court of record with limited jurisdiction in their respective counties and derives all power and jurisdiction from legislative enactment.

There is no statute authorizing the expenditure of county funds by boards of county commissioners or boards of revenue for the purchase of flags to be displayed on court house lawns.

Chapter 32, Title 52, there being only four sections in this chapter, and Section 552 therein, provides for school boards to pay for flags to be displayed at public schools.

Therefore, I hold that the court of county commissioners or board of revenue has no authority to spend public funds for flags to be displayed on court house lawns.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

June 30, 1943.

Hon. G. H. Boyd, Register,

Tenth Judicial Circuit of Alabama,

Equity Division,

Jefferson County,

Birmingham, Alabama.

Registers of Circuit Courts—

1. The offices of circuit judges and registers of the circuit court are public offices and registers of that court cannot, at the same time, hold the office of circuit judge and register.

2. The fact that the officer agrees to hold one of the offices without compensation does not change the principle.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for an official opinion, bearing date of June 25, 1943, is as follows:

"Is a Register in Chancery qualified to be appointed and act as a Special Circuit Judge, without compensation, in the same circuit in which he is Register, the said Register being an attorney and a member of the Bar?"

To correctly answer your question, it is only necessary to call attention to a few legal principles that are definitely settled in this State.

Every person who is appointed or elected to perform public functions with authority derived from the State by legislative enactment prescribing his powers and authority and fixing his compensation in whatever shape is a public officer. **Mitchell v. State ex rel Welsh,** 163 Ala. 425; **State ex rel Glenn v. Wilkinson,** 220 Ala. 172; **Hard, State Comptroller v. Ex Rel Owens,** 228 Ala. 677.

The statute brings registers of the circuit court squarely within the authorities cited above. Code 1940, Title 13, Sections 210 and 213.

The Constitution makes him a constitutional officer. Constitution of 1901, Section 163. The circuit judges are likewise public officers. Constitution, Sections 139, 143, 146, 152, 155 and 160, Code of Alabama, Title 13, Sections 112, 126, 127, and 129.

Section 280 of the Constitution, among other things, provides that no person shall hold two offices of profit at one and the same time under this State except justices of the peace, constables, notaries public and commissioners of deeds.

Aside from this constitutional provision it is a settled principle of common law that a public official cannot hold two incompatible offices at the same time. 42 **Am. Juris.** (Public Officers) Sections 59 and 70. From the foregoing principle it is self-evident that one person cannot hold at the same time the office of register of the circuit court and that of circuit judge. The question cannot be affected by acting in one of the official capacities without compensation. The compensation is merely incidental. The real purpose is to prevent the holding and exercising of two public offices by one person at the same time. Moreover the agreement to serve without compensation is not binding on the promisor. **Jeffers v. Wharton,** 240 Ala. 21.

Further elaboration of the question is unnecessary.

Yours very truly,

WILLIAM N. McQUEEN,

Acting Attorney General.

QUARTERLY REPORT, ATTORNEY GENERAL

APRIL 1, 1943 THROUGH JUNE 30, 1943

INDEX TO VOLUME XXXI

Page

ACTS (General and Local)

GENERAL ACTS 1911:

Page 289 52

GENERAL ACTS 1931:

Page 8 84

GENERAL ACTS 1931:

Page 99 52

GENERAL ACTS 1931:

Page 337 44

GENERAL ACTS, EXTRA SESSION 1932:

Page 99 66

GENERAL ACTS 1935:

Page 950 57

GENERAL ACTS 1935:

Page 1092 92

GENERAL ACTS, EXTRA SESSION 1936-37:

Page 150 57

GENERAL ACTS 1939:

Page 67 44

GENERAL ACTS 1939:

Pages 721, 725 57

LOCAL ACTS 1919:

Page 194 36

LOCAL ACTS, SPECIAL SESSION 1920:

Page 171 19

LOCAL ACTS 1927:

Page 375 19

INDEX—Continued

Page

LOCAL ACTS 1931:

Page 139 36

LOCAL ACTS 1935:

Page 111 22

LOCAL ACTS 1935:

Page 171 22

ADJUSTMENT, STATE BOARD OF:

Decree releasing or refunding money to foreign insurance company—future liability 77
May offer award payable from school funds—Specific decree construed 82

ALABAMA INSTITUTE FOR DEAF AND DUMB:

Injured employee—may not sue 72

ASSESSMENTS:

Motor vehicles in hands of dealer 40

BANKS AND BANKING:

Special examination—Expenses 50
Unemployment Compensation Law—State banks not exempt from operation of 57

BOARD OF COUNTY COMMISSIONERS:

See Court of County Commissioners

BOARD OF EQUALIZATION:

Records—Tax Assessor can not destroy 91

BOARD OF REVENUE:

See Court of County Commissioners

BONDS:

City of Montgomery—Commissioner's Bond—Approved, filed and recorded by Judge of Probate 52
Municipal—Public improvement bonds—audit of book before issuing 27
Writ of Restitution—Sheriff can not require indemnity bond before executing 45

CERTIFICATES:

Birth and death certificates—Veterans—When entitled to same free 15

INDEX—Continued

Page

CLERKS OF CIRCUIT COURTS:

Criminal Appeals—Fee for preparing original and copy of transcript 47
Probation cases—Fee for making record on appeal 64
Trial tax—When chargeable in condemnation in prohibition cases 98
Unclaimed witness fees—not entitled to commission on 42

CODE OF ALABAMA, 1907:

Section 1497 52
Section 6634 19

CODE OF ALABAMA, 1923:

Section 1347 54
Section 2724 74
Sections 3135-3137 66
Section 3739 47
Section 6102 47

CODE OF ALABAMA, 1940:

TITLE 5:

Sections 18, 19, 20 50
Section 137 57

TITLE 7:

Section 533 45
Section 768 47
Section 875 45

TITLE 8:

Section 113 74

TITLE 11:

Section 1 42
Section 7 53
Section 55 42
Section 86 19
Section 89 47
Section 90 64
Section 98 7

TITLE 12:

Section 12(19) 34
Section 118 25

TITLE 13:

Section 112 100
Sections 126, 127 100
Section 129 100

INDEX—Continued

Page

Section 198 42
Section 210 100
Section 213 100

TITLE 21:

Section 160 15
Section 174 15

TITLE 22:

Sections 249, 250 70

TITLE 23:

Section 2 84

TITLE 26:

Sections 180, 252 57

TITLE 29:

Section 254 98

TITLE 30:

Section 10 89

TITLE 35:

Section 12 13

TITLE 37:

Section 81 27
Section 109 27
Section 292 27
Section 418 27
Section 445 27
Section 499 34
Section 732 44

TITLE 38:

Section 104 74
Section 107 74

TITLE 41:

Section 46 52
Section 139 91
Section 141 91
Section 144 91

TITLE 42:

Section 16 10
Section 20 64

INDEX—Continued

Page

TITLE 45:

Section 69 47

TITLE 46:

Section 265 70

TITLE 48:

Section 302(4) 79

TITLE 51:

Section 2 5
Section 2 94
Section 15 86
Section 20 97
Section 20 98
Section 21 (d) (e) 40
Section 110 62
Section 304(a) 94
Section 313 86
Section 313 94
Sections 630, 631 68
Section 704 40
Section 706(a) 60
Section 756 11
Section 764 11
Section 785 11
Section 816 77
Section 835 31
Section 884 5

TITLE 52:

Section 100 92
Section 519 72

TITLE 54:

Section 5(1) 45

TITLE 55:

Section 301 31
Section 301 84
Section 340 82
Section 343 82

TITLE 62:

Section 568 52

CONDEMNATION:

Trial Tax—When chargeable in condemnation in prohibition cases 98

INDEX—Continued

Page

CONSTITUTION, 1901:

Section 14 ... 72
Section 45 ... 36
Section 91 ... 94
Section 94 ... 34
Section 100 ... 77
Section 139 ... 100
Section 143 ... 100
Section 146 ... 100
Section 152 ... 100
Section 155 ... 100
Section 160 ... 100
Section 163 ... 100

CONSTITUTIONALITY:

Morgan County—County Court—Act creating (Local Acts 1919, page 194) Constitutional ... 36
Morgan County—Local Act 1931 granting equity jurisdiction to County Court Constitutional ... 36

COSTS AND FEES:

Clerk Circuit Court—Criminal Appeals—Preparing original and copy of transcript ... 47
Circuit Clerk—Unclaimed witness fees—not entitle to commission on ... 42
County Solicitor—Lawrence County—When entitled to solicitor's fees ... 19
Criminal forfeiture—Conditional judgment set aside on hearing—County can not pay costs ... 17
Judgment against Defendant—Execution must be returned "no property found," before issuing against plaintiff ... 56
Jurors—Attendance—Mileage—outside of county ... 7
Probation Cases—Clerk—Record on appeal ... 64
Trial Tax—When chargeable in condemnation in prohibition cases ... 98
Trial Tax—Workmen's Compensation cases settled out of court but docketed for record ... 97

COUNTIES:

Automobile not owned by—No authority to repair or equip ... 88
Baldwin County Land Agent—Compensation under contract with State Tax Commission ... 66
Etowah—Principal Judge Board of Revenue—must file claim with Board for compensation ... 25
Flags—No authority to purchase ... 99
May not receive fees levied by city without statutory authority ... 34
Meat Inspector—No authority to appoint—May not own or operate abattoir ... 34

COUNTY BOARD OF EDUCATION:

Property—Purchased after tax lien attaches—subject to sale ... 5
School Trustees—Nomination—Who may participate in ... 92

INDEX—Continued

Page

COUNTY COURT OF COMMISSIONERS:

Automobile not owned by county—No authority to repair or equip 88
County Land Agent—Compensation under contract with State Tax Commission 66
Etowah County—Principal Judge Board of Revenue—must file claim with Board for compensation 25
Flags—No authority to purchase for display on court-house lawn 99
Meat Inspector—No authority to appoint—May not own or operate abattoir 34
National Association of County Officials—Expenses of members attending 54

COURTS:

Morgan County—Local Act 1919 creating constitutional 36
Morgan County—Local Act 1931 granting equity jurisdiction to constitutional 36

ETOWAH COUNTY:

Principal Judge Board of Revenue—must file claim with Board for compensation 25

EXAMINER OF ACCOUNTS:

Municipalities—Audit of books 27

EXCISE TAX:

Oil—Summer black oil—manufacture of shells—not subject to 68

EXEMPTIONS:

Homestead—Property redeemed from State 86
State Banks—not exempt from unemployment compensation law 57

FINES:

Board of Pardon and Paroles—No authority to refund 10

FORFEITURES:

Board of Pardon and Paroles—No authority to refund 10
Conditional judgment set aside on hearing—County can not pay costs 17

FUNDS:

School—Board of Adjustment may order award payable from 82

GAS:

Butane—Sale not subject to regulation by Public Service Commission 79

HEALTH AND HEALTH DEPARTMENT:

Board of Medical Examiner—Physician narcotic addict—No authority to have committed for treatment 70

INDEX—Continued

Page

Bureau of Vital Statistics—Veterans—When entitled to free birth and death certificates 15

HIGHWAYS AND HIGHWAY DEPARTMENT:

Director entitled to confidential assistant or secretary—salary 84

HOMESTEAD:

Exemption—Property redeemed from State 86

INDUSTRIAL RELATIONS, DEPARTMENT OF:

Unemployment compensation law—State banks not exempt from operation of 57

INSURANCE:

License—Foreign Insurance Company—Board of Compromise—Decree releasing or refunding money—future liability 77

JUDGES:

Registers can not hold office of Circuit Judge 100

JUDGE OF PROBATE:

City of Montgomery—Commissioner's Bond—Approval, filing and recording 52
Lee County—Assessment and collection municipal taxes—compensation in connection with 22
Motor vehicle license—transfer—no fee for copy of certificate furnished new owner 60

JURIES:

Jury Commissioners—Term of office 89

JURORS AND JURIES:

Attendance—Mileage—Not entitled to from point outside of county 7

LAND AGENTS:

County—Compensation for services under contract with State Tax Commission 66

LAWRENCE COUNTY:

County Solicitor—Solicitor's fees—when entitled to 19

LEASES:

Beds of navigable streams 74

LEE COUNTY:

Municipal taxes—Assessment and collection—Compensation Judge of Probate 22

INDEX—Continued

Page

LICENSES:
Foreign Insurance Company—Board of Compromise—Decree releasing or refunding money—Future liability ... 77
Motor vehicle—Transfer—No fee for copy of certificate furnished new owner ... 60

LICENSE INSPECTORS:
Merit System—not under ... 31
Director Highway Department entitled to confidential assistant or secretary—salary ... 34

MERIT SYSTEM:
License Inspectors not under ... 31

MILITARY AND NAVAL AFFAIRS:
Deputy Solicitor—Naval Reserve officer called to active duty—entitled to ... 13

MORGAN COUNTY:
County Court—Act creating (Local Acts 1919, page 194) constitutional ... 36
County Court—Act granting equity jurisdiction (Local Acts 1931, page 139) constitutional ... 36

MOTOR VEHICLES:
Ad valorem tax on in hands of dealer ... 40
Transfer of License—No fee for copy of certificate furnished new owner ... 60

MUNICIPALITIES:
Audit of books discussed generally ... 27
Montgomery—Commissioner's bond—Approval, filing and recording ... 52
Property redeemed from State by—not liable for taxes for current year ... 94
Taxes—Compensation of tax collector and tax assessor ... 44
Taxes—Lee County—Assessment and collection—Compensation Judge of Probate ... 22

OFFICERS AND OFFICES:
Jury Commissioners—Term of office ... 89
Register can not hold office of Circuit Judge ... 100
School Trustees—Nomination—Who may participate in ... 92

OILS:
Excise tax—Summer black oil—Manufacture of shells—Not subject to ... 68

OPINIONS OVERRULED, MODIFIED OR DISTINGUISHED:
Biennial Report 1928-30, page 686 ... 17
Biennial Report 1930-32, page 454 ... 40
Biennial Report 1934-36, page 246 ... 97
Biennial Report 1936-38, page 698 ... 40
Quarterly Report Volume VIII, page 166 ... 7
Quarterly Report Volume XXIX, page 31 ... 62

PARDON, PAROLE AND PROBATION:
Fines and Forfeitures—No authority to refund ... 10

INDEX—Continued

Page

PHYSICIANS:

Certificate of qualification—Revocation—Board of Medical Examiners no authority to obtain possession of 70
Narcotic addict—Board of Medical Examiners—No authority to have committed for treatment 70

PROBATION:

Appeal cases—Fee of clerk for making record 64

PUBLIC SERVICE COMMISSION:

Butane Gas—Regulation of sale 79

PUBLIC UTILITIES:

Butane gas companies—not subject to regulations of Public Service Commission 79

RECORDS:

Board of Equalization—Tax Assessor can not destroy of 91

REDEMPTION:

Homestead exemption—Property redeemed from State 86
Property redeemed from State by a municipality not liable for taxes for current year 94

REFUNDS:

Board of Pardon and Paroles—Fines and forfeitures—no authority to refund 10
Foreign Insurance Company—License—Board of Compromise—Decree releasing or refunding money—future liability 77

REGISTERS:

Can not at same time hold office of Circuit Judge 100

REVENUE DEPARTMENT:

Sales Tax—Waiver of penalty and interest—Allowance of discount 11

SALES TAX:

Waiver of penalty and interest—Allowance of discount 11

SCHOOLS:

County Board of Education—Property purchased after tax lien attaches—subject to sale 5
State Board of Adjustment may order award payable from school funds 82
Trustees—Nomination—Who may participate in 92

SCHOOL CODE 1927:

Section 133 92

INDEX—Continued

Page

SHERIFFS:

Writ of restitution—Can not require indemnity bond before executing 45

SOLICITORS:

County—Lawrence County—Fees—When entitled to 19
Deputy—Naval leave 13

STATE:

Lease of beds of navigable streams 74

STATE BOARD OF MEDICAL EXAMINERS:

No authority to have physician narcotic addict committed by court for treatment 70
Revocation of physician's certificate of qualification—No authority to obtain possession of 70

STREAMS:

Title to beds of navigable streams 74

TAXATION:

Appeal from increased assessment—Sale of property pending appeal 62
County Board of Education—Property purchased after tax lien attaches—subject to sale 5
Excise tax—Summer black oil—Manufacture of shells—not subject to 68
Homestead Exemption—Property redeemed from State 86
Motor vehicles—Ad valorem tax on in hands of dealer 40
Municipalities—Lee County—Assessment and collection—Compensation Judge of Probate 22
Property redeemed from State by a municipality not liable for taxes for current year 94
Sales Tax—Waiver of penalty and interest—Allowance of discount 11

TAX ASSESSORS:

Municipal taxes—Compensation for assessing 44
Records—Board of Equalization—Docket sheets or letters of protest—can not destroy 91

TAX COLLECTORS:

Appeal from increased assessment—Sale of property pending appeal 62
Municipal taxes—Compensation for collecting 44

TAX SALES:

Appeal from increased assessment—Sale of property pending appeal 62

U. S. C. A.:

Title 34, Section 853c 15

VETERANS:

Birth and death certificates—When entitled to free 15

WORKMEN'S COMPENSATION:

Trial tax—Cases settled out of court but docketed for record 97